No. 97-873-CFY Title: United States, Petitioner
v.
Aloyzas Balsys

Docketed: November 25, 1997 Court: United States Court of Appeals for the Second Circuit

Entry	Date	Proceedings and Orders
	Nov 24 1997	Petition for writ of certiorari filed. (Response due December 25, 1997)
	Nov 24 1997	Appendix of petitioner filed.
	Dec 23 1997	Brief of respondent Aloyzas Balsys in opposition filed.
	Dec 30 1997	DISTRIBUTED. January 16, 1998
	Jan 16 1998	Petition GRANTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 27, 1998. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 27, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT April 20, 1998. **********
	Feb 27 1998	Brief of petitioner United States filed.
	Feb 27 1998	Joint appendix filed.
	Mar 6 1998	Motion of World Jewish Congress and Holocaust Survivors, et al. for leave to file a brief as amici curiae filed.
	Mar 16 1998	CIRCULATED.
	Mar 23 1998	Motion of World Jewish Congress and Holocaust Survivors, et al. for leave to file a brief as amici curiae GRANTED.
	Mar 26 1998	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Mar 26 1998	Brief of respondent Aloyzas Balsys filed.
	Mar 26 1998	Lodging consisting of ten copies of an article submitted by counsel for the resondent.
	Apr 13 1998	Reply brief of petitioner United States filed.
	Apr 15 1998	Record filed.
	Apr 17 1998	Record filed.
	Apr 20 1998	ARGUED.

1pp

(1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General

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QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-50a) is reported at 119 F.3d 122. The opinion of the district court (App. 53a-80a) is reported at 918 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1997. A petition for rehearing was denied on September 25, 1997. App. 51a-52a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

In 1993, the Department of Justice issued an administrative subpoena requiring respondent Aloyzas Balsys, a resident alien born in Lithuania, to appear for a deposition to answer questions relating to his activities in Europe during World War II and his immigration to the United States. At his deposition, respondent invoked the Fifth Amendment privilege against compelled self-incrimination and refused to answer any questions about his wartime activities or his immigration to the United States. The district court granted the government's petition to enforce the subpoena. App. 53a-80a. The court of appeals vacated the district court's order and remanded for further proceedings. App. 1a-50a.

1. Respondent is a resident alien of Lithuanian nationality. On May 2, 1961, he submitted an application for an immigrant visa and alien registration at the American Consulate in Liverpool, England. On his application, he stated that he had served in the Lithuanian army between 1934 and 1940, and that he had lived in hiding in Plateliai, Lithuania, between 1940 and 1944. He swore under oath that the answers on his immigrant visa application were true and correct. App. 3a, 54a.

Based upon those answers, respondent was granted an immigrant visa. On June 30, 1961, he immigrated

to the United States from England pursuant to the Immigration and Nationality Act, 8 U.S.C. 1201. He currently resides in New York. App. 3a, 54a.

The Office of Special Investigations of the Department of Justice (OSI) is investigating whether respondent illegally obtained admission to the United States by concealing assistance in Nazi persecution during World War II. OSI suspects that respondent was neither living in Plateliai, Lithuania, nor in hiding between 1940 and 1945. Rather, OSI suspects that he was living in Vilnius, Lithuania, and was a member of the Lithuanian Security Police, known as "Saugumas," which persecuted Jews and other civilians in collaboration with the Nazi government of Germany. App. 3a; Gov't C.A. Br. 3-4. If respondent did assist the forces of Nazi Germany in persecuting persons because of their race, religion, national origin, or political opinion, he would be subject to deportation under 8 U.S.C. 1182(a)(3)(E) and 1227(a)(4)(D). He would also be subject to deportation under 8 U.S.C. 1182(a)(6)(C)(i) and 1227(a)(1)(A) for lying under oath on his immigrant visa application about his activities during World War II. See App. 3a.

In 1993, OSI issued an administrative subpoena requiring respondent to appear for a deposition and to produce documents relating to his activities in Europe between 1940 and 1945 and to his immigration to the United States in 1961. At his deposition, respondent refused to answer any questions concerning his wartime activities or his immigration to the United States. He claimed that he had a right not to do so based on the Fifth Amendment privilege against compelled self-incrimination. He did not contend that his responses to OSI's inquiries could incriminate

him in any domestic prosecution.[1] Rather, he contended that those responses could subject him to prosecution in Lithuania, Israel, and Germany. App. 3a-4a, 55a, 57a; Gov't C.A. Br. 4-5.[2]

The government filed a petition for enforcement of the subpoena pursuant to 8 U.S.C. 1225(a) (1994). The district court granted the petition and ordered respondent to testify. App. 4a-7a, 53a-80a. Although the court found that respondent "faces 'a real and substantial' danger of prosecution by Lithuania and Israel," App. 70a, the court held that respondent could not invoke the Fifth Amendment privilege to avoid giving testimony that would incriminate him solely in a foreign prosecution, App. 71a-78a

2. The court of appeals vacated the district court's order enforcing the administrative subpoena and remanded the case for further proceedings. App. 1a-50a. The court held that a witness who has a real and substantial fear of prosecution in a foreign country may assert the Fifth Amendment privilege

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[1] As the court of appeals recognized, "[s]ince a deportation proceeding is a civil action and not a criminal prosecution, [respondent] did not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him." App. 8a (citation omitted).

[2] In 1992, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. See App. 61a-62a & n.9. Israel imposes the death penalty on persons who "'during the period of the Nazi regime, in an enemy country,' committed crimes against the Jewish people." See App. 64a-65a & n.11. Germany has prosecuted persons suspected of crimes against Jews during World War II under its murder statute, although it is uncertain whether the statute may be applied to non-German citizens alleged to have committed murder outside Germany. See App. 63a-64a & n.10.

against compelled self-incrimination to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of criminal prosecution in this country. App. 2a, 40a. The court acknowledged that other circuits had reached a contrary conclusion. App. 10a-11a (citing *United States* v. *Under Seal (Araneta)*, 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924 (1986); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970)).[3]

The court of appeals initially concluded that "[t]he language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions." App. 8a. The court then turned to the question "whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege 'promotes or defeats [the] policies and purposes'" served by the privilege. App. 15a-16a (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 55 (1964)).[4] First, the court found that "[p]ermitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the privilege in cases where the fear is of domestic prosecution." App. 16a. Second, the court reasoned that "[t]he systemic policies of American criminal justice that underl[ie] the Fifth Amendment"—such as the "state-individual balance" in criminal trials—"are neither promoted

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[3] The Eleventh Circuit's conflicting decision in *United States* v. *Gecas*, 120 F.3d 1419 (1997) (en banc), was issued after the Second Circuit's decision in this case.

[4] The United States did not challenge the district court's finding that respondent has a real and substantial danger of prosecution by Lithuania and Israel. App. 7a.

nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution." App. 17a. Third, the court decided that allowing persons who fear foreign prosecution to invoke the privilege furthered the purpose of preventing government overreaching. App. 17a-22a. The court believed that, given the "[i]nternational collaboration in criminal prosecutions" in recent years, the government may have an incentive to use "abusive measures" to extract confessions for use in foreign prosecutions. App. 18a-21a.[5]

The court rejected the view of other circuit and district courts that domestic law enforcement would be seriously undermined if witnesses could invoke the Fifth Amendment privilege based solely on a fear of foreign prosecution. App. 26a-28a. The court acknowledged that allowing such witnesses to invoke the privilege "has costs for domestic law enforcement," because the United States cannot compel the witness's testimony by granting him immunity from foreign prosecution, as it can from domestic prosecution. App. 27a. But the court found "the strength of this objection to be exaggerated" (*ibid.*) for several reasons: that those cases in which a witness can establish a real and substantial fear of foreign prosecution "rarely occur" (App. 29a); that a witness could ordinarily invoke the privilege only with respect to foreign activities, whereas the principal focus of domestic law enforcement is on activities in

[5] The court also found "significant support" for its view in *Murphy*'s "statement and acceptance of the English common law rule" that the privilege against compelled self-incrimination applied whether the witness was under a threat of domestic or foreign prosecution. App. 23a-25a (citing *Murphy*, 378 U.S. at 63).

the United States (App. 31a); and that the government could ask that adverse inferences be drawn against a witness in a domestic civil proceeding based on his refusal to testify (App. 32a-33a). The court also suggested that Congress and the Executive Branch could "limit dramatically the domestic law enforcement costs of the interpretation of [the] Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes." App. 39a.[6]

Judge Meskill concurred in the result. App. 49a-50a. He cautioned that "our decision today should not be interpreted as *carte blanche* for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution" because "[o]ther scenarios may call for a different result." App. 49a. In his view, "[the] decision should be limited to the facts before us and to OSI proceedings." App. 49a-50a.

District Judge Block wrote a concurring opinion, which Judge Calabresi joined. App. 43a-48a. Judge Block "express[ed] [his] concern, triggered by Judge Meskill's concurrence in the result, that [the] decision today may be perceived as qualifying the privilege in cases involving a real and substantial fear of foreign prosecution based upon a case-by-case analysis of domestic law enforcement." App. 43a-44a. In his view, the application of the Fifth Amendment

[6] The court also held that respondent had not waived the Fifth Amendment privilege by answering questions, under oath, concerning his World War II activities in his 1961 visa application. App. 40a-43a.

privilege to any witness who faced a real and substantial danger of foreign prosecution is "unqualified." App. 45a. After acknowledging the contrary positions of the Fourth Circuit in *Araneta* and of the district court in *United States* v. *Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), Judge Block observed that "the debate on this issue * * * will continue until resolved by the Supreme Court." App. 44a-45a.

REASONS FOR GRANTING THE PETITION

The Second Circuit held in this case that a witness who faces no danger of criminal prosecution in the United States may nevertheless invoke the Fifth Amendment privilege against compelled self-incrimination, and thereby avoid testifying in a domestic civil proceeding, if his testimony may incriminate him in a criminal prosecution by a foreign country. In allowing the Fifth Amendment privilege to be invoked based solely on a witness's fear of foreign prosecution, the Second Circuit's decision squarely conflicts with decisions of the Fourth, Tenth, and Eleventh Circuits. Moreover, the Second Circuit's expansive interpretation of the Self-Incrimination Clause creates a substantial impediment to domestic law enforcement, particularly where the government seeks to obtain testimony from accomplice witnesses in the growing number of cases involving criminals who operate internationally. The importance of the constitutional issue presented in this case is indicated by this Court's noting of probable jurisdiction to address the issue in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972), although the Court ultimately disposed of the case without reaching the issue.[7]

1. The Second Circuit's decision in this case directly conflicts with the decisions of three other courts of appeals. Most recently, the Eleventh Circuit held, on what the Second Circuit recognized to be "facts very similar to those in th[is] case" (App. 11a), that a witness may not invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of foreign prosecution. *United States* v. *Gecas*, 120 F.3d 1419 (1997) (en banc). Like respondent in this case, Gecas was a resident alien whom OSI suspected had illegally obtained admission to the United States by concealing assistance in Nazi persecution of Lithuanian Jews during World War II. *Id.* at 1422-1423. And he likewise was found to have a real and substantial fear of prosecution and conviction in a foreign country. *Id.* at 1427.

The Eleventh Circuit held that a prosecution is not a "criminal case," within the meaning of the Fifth Amendment's provision that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself," if the prosecution does not occur in a jurisdiction that is subject to the Fifth Amendment. 120 F.3d at 1457. Because Gecas faced a danger of prosecution and conviction only by countries that are not themselves subject to the Fifth Amendment, the court held that "the Fifth Amendment's Self-Incrimination Clause does not extend to Gecas' real and substantial fear of foreign conviction." *Ibid.* In

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[7] See also *Araneta* v. *United States*, 478 U.S. 1301, 1303 (1986) (Burger, C.J., in chambers) (granting stay on ground, *inter alia*, that "four Justices will likely vote to grant certiorari on the issue"), stay vacated, 479 U.S. 924 (1986).

so holding, the court rejected Gecas's argument that the "main purpose" of the self-incrimination privilege is "the protection of individual privacy and dignity," so that an individual has the "freedom to remain silent * * * regardless of where the infliction of criminal penalties will occur." *Id.* at 1435. After an exhaustive examination of the history of the privilege (*id.* at 1436-1456), the court concluded that the privilege "was intended as a limitation on the investigative techniques of government, not as an individual right against the world." *Id.* at 1456.[8]

The Second Circuit's decision in this case also conflicts with decisions of the other two courts of appeals that have decided the constitutional issue. In *United States* v. *Under Seal (Araneta)*, 794 F.2d 920, 925-928 (4th Cir.), cert. denied, 479 U.S. 924 (1986), the Fourth Circuit held that a witness may not invoke the Fifth Amendment privilege based solely on a real and substantial fear of criminal prosecution by a foreign country. See also *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1112 (4th Cir.), cert. denied, 484 U.S. 890 (1987); *United States* v. *(Under Seal)*, 807 F.2d 374, 375-376 (4th Cir. 1986). The Tenth Circuit has similarly held that "[t]he fifth amendment was intended to protect against self-incrimination for crimes committed against the United States * * * but need not and should not be interpreted as applying to acts made criminal by

[8] The en banc court was closely divided in *Gecas*. Five judges joined the majority opinion, and another concurred specially in the result. Five judges dissented in two separate opinions.

the laws of a foreign nation." *In re Parker*, 411 F.2d 1067, 1070 (1969), vacated as moot, 397 U.S. 96 (1970).[9]

2. The Second Circuit erred in extending the protection of the Self-Incrimination Clause to a witness who invokes it based solely on a fear of foreign prosecution. The Fifth Amendment's reference to a "criminal case" does not encompass foreign prosecutions. Nothing in the Fifth Amendment, the Bill of Rights, or the Constitution as a whole suggests that the Framers intended the Clause's protection against compulsory self-incrimination to have a broader scope than other provisions of the Bill of Rights, which apply to domestic trials but not to criminal prosecutions in foreign countries. Cf. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) ("[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950) (declining to apply the Fifth Amendment extraterritorially in a habeas case by aliens arrested, prosecuted, and convicted abroad of war crimes). Instead, just as the phrases "all criminal prosecutions" in the Sixth Amendment and "Suits at common law" in the Seventh Amendment apply only to domestic criminal and civil proceedings, the phrase "any criminal case" in the Fifth Amendment does not encompass foreign criminal cases brought by foreign powers.

[9] See also *Phoenix Assurance Co. of Canada* v. *Runck*, 317 N.W.2d 402, 413 (N.D.) (holding that "the fifth amendment privilege, in the absence of a treaty or understanding, does not apply to possible foreign prosecution"), cert. denied, 459 U.S. 862 (1982).

The Self-Incrimination Clause applies only where the witness fears prosecution by a sovereign that is itself subject to the Fifth Amendment, *i.e.*, the federal or state governments. In cases decided before the Court applied the Self-Incrimination Clause to the States through the Fourteenth Amendment, see *Malloy* v. *Hogan*, 378 U.S. 1 (1964), the Court held that a fear of prosecution in a jurisdiction not covered by the Fifth Amendment did not justify invocation of the privilege. *United States* v. *Murdock*, 284 U.S. 141 (1931) (federal witness could not invoke privilege based on fear of a state prosecution); see also *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958) (state witness could not invoke privilege based on fear of federal prosecution). Under those authorities, the Fifth Amendment did not apply unless both the compelling government and the using government were bound by the Fifth Amendment.

This Court overruled *Murdock* and *Knapp* on the same day that it decided *Malloy* v. *Hogan*, *supra*. See *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964) (holding that Fifth Amendment privilege "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law"). But given the Court's holding in *Malloy* that the Self-Incrimination Clause applies to the States, it remains true that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *Araneta*, 794 F.2d at 926; see *Murphy*, 378 U.S. at 57 n.6 (noting that the case involved a "'compelling' government" and a "'using' government" that were both bound to recognize the

Fifth Amendment privilege). Because the Fifth Amendment does not restrain foreign governments from compelling and using self-incriminating testimony, the Fifth Amendment's protection does not attach to a fear of incrimination in a foreign prosecution.[10]

The policies underlying the Self-Incrimination Clause in the domestic context do not justify an extension of its protection to fears of foreign prosecution. While the court of appeals found a parallel between the "cooperative federalism" noted by the Court in *Murphy* and the "cooperative internationalism" it believed currently exists in law enforcement, the two contexts are significantly different. In domestic criminal cases, the compelling authority (federal or state) can grant immunity from use of the compelled testimony, so as to permit the sovereign that has need of the testimony to obtain it. See *Murphy*, 378 U.S. at 78-79; *In re Grand Jury Proceedings*, 860 F.2d 11, 14-15 (2d Cir. 1988) (grant of immunity under 18 U.S.C. 6002 bars the use of the compelled testimony in both state and federal criminal proceedings).

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[10] *Murphy*'s acceptance of what the Court understood to be "[t]he settled English rule" that a witness could invoke the privilege "where there is a real danger of prosecution in a foreign country" (378 U.S. at 67, 77) does not control the decision in this case. Quite apart from the doubt that exists about *Murphy*'s understanding of English law, see, *e.g.*, *Araneta*, 794 F.2d at 927; cf. *Murphy*, 378 U.S. at 81 n.1 (Harlan, J., concurring in the judgment), a different result is dictated here by the text of the Constitution, and the danger of preventing the acquisition of evidence for domestic law enforcement based on the potential collateral use of such evidence in foreign prosecutions.

The same does not hold true in the context of foreign prosecutions. Neither the federal government nor a State has the authority to grant a witness immunity against prosecution by a foreign sovereign. Nor can any court in the United States exercise its supervisory power to adopt an exclusionary rule prohibiting foreign sovereigns from using the compelled testimony of a witness granted immunity by the federal government or a State. In contrast to the situation in *Murphy*, under the Second Circuit's view, a witness who has been granted immunity from domestic prosecution may still refuse to testify based on a fear of foreign prosecution, and the federal government and the States will be constrained in their ability to investigate and prosecute violations of their laws by virtue of the potential actions of foreign governments.

3. The question presented in this case is thus of considerable importance to the domestic law-enforcement interests of the United States and the individual States. See *Murphy*, 378 U.S. at 79 (noting that "the interests of the State and Federal Governments in investigating and prosecuting crime" must be taken into account in determining scope of Fifth Amendment privilege). The Second Circuit suggested that its rule would not impede domestic law enforcement, because "it is difficult to establish a real and substantial fear of criminal prosecution abroad." App. 30a. But while the requirement that a witness establish a real and substantial fear of foreign prosecution would weed out some insubstantial and manufactured claims of privilege, that would merely decrease the number of potentially valid claims. It would not diminish the impediments to federal and state law enforcement created by allowing witnesses

to avoid testifying if they can satisfy that requirement.

Those impediments are substantial. The United States is increasingly the target of criminals operating internationally. The Second Circuit's extension of the Fifth Amendment privilege to protect a witness against a fear of foreign prosecution will adversely affect the government's ability to prosecute crimes that cross national borders, particularly since the privilege "not only extends to answers that would in themselves support a conviction under a * * * criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a * * * crime." *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951). For example, in a case involving a foreign national accused of operating a cartel that smuggled illegal drugs into the United States, the smuggler's underlings could avoid testifying against him by asserting that they could be prosecuted in their native country. Cf. *In re Grand Jury Proceedings 82-2*, 705 F.2d 1224, 1225 (10th Cir. 1982) (witness sought to avoid testifying before grand jury regarding "illegal laundering of narcotics money inside and outside the territory of the United States" based solely on fear of foreign prosecution), cert. denied, 461 U.S. 927 (1983). Or, a "renegade [foreign sovereign] seeking to protect the bosses of a drug cartel or the leaders of a terrorist organization" could impede the enforcement of United States law by disingenuously "threatening the prosecution of lieutenants granted immunity" by federal or state authorities. *United States* v. *Lileikis*, 899 F. Supp. 802, 807 n.9 (D. Mass. 1995); cf. *Araneta*, 794 F.2d at 921 (relatives of former Philippine President Marcos asserted fear of foreign

prosecution to avoid testifying in grand jury investigation into corruption in arms sales between U.S. companies and the Philippines).

This Court has observed that the government's ability to grant immunity is "essential to the effective enforcement of various criminal statutes," because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar* v. *United States*, 406 U.S. 441, 446, 447 (1972). Because the United States cannot grant a witness immunity from foreign prosecution, however, the Second Circuit's extension of the Fifth Amendment privilege would, in many cases, deprive the government of vital evidence.

As this case illustrates, the Second Circuit's decision also deprives the government of an important tool in immigration and other civil matters. The government frequently relies on deposition testimony in denaturalization and deportation actions. Under the Second Circuit's decision, many witnesses summoned for a deposition in such cases may claim that they are subject to foreign prosecution and thereby avoid giving testimony that the government otherwise would have a right to obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 504—August Term, 1996

Docket No. 96-6144

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

ALOYZAS BALSYS, RESPONDENT-APPELLANT

Argued Oct. 21, 1996

Decided July 15, 1997

Before: MESKILL and CALABRESI, Circuit Judges, and BLOCK, District Judge.*

CALABRESI, Circuit Judge, with whom Judge BLOCK joins:

Aloyzas Balsys appeals from a decision and order of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*), entered on March 13, 1996, granting the government's motion for an order compelling compliance with a Department of Justice Office of Special Investiga-

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* The Honorable Frederic Block, of the United States District Court for the Eastern District of New York, sitting by designation.

tions ("OSI") administrative subpoena that sought answers to deposition questions and requested documents as part of an investigation into whether Balsys lied on his immigration application about his activities during WWII.

In this appeal, we are asked to consider two questions that delineate the scope of the Fifth Amendment privilege against self-incrimination. First, we must determine whether the privilege protects a witness from being compelled to testify where there is a real and substantial risk that the testimony, or the evidence derived therefrom, will be used against him in a foreign criminal prosecution. Second, we must decide whether an alien's voluntary statements on an application for an entry visa to the United States constitute a waiver of the Fifth Amendment with respect to a deportation investigation concerning those statements.

We find that the language and purposes of the Fifth Amendment are best followed by allowing a witness with a real and substantial fear of foreign prosecution to invoke the privilege against self-incrimination in domestic proceedings, that permitting the privilege in such cases need not hamper the legitimate goals of the United States to a significantly greater degree than does invocation of the privilege in the face of domestic prosecution, and that this interpretation of the privilege is most consistent with the precedents of the Supreme Court and of this court. We also conclude that Balsys did not waive his right to invoke the privilege by completing a visa application in 1961. Accordingly, we vacate the district court's order.

BACKGROUND

Aloyzas Balsys is a resident alien currently living in Woodhaven, New York. He was born on February 6, 1913 in Lithuania and entered the United States on June 30, 1961. In his application for Immigrant Visa and Alien Registration, Balsys stated that between 1934 and 1940, he served in the Lithuanian army, and that between 1940 and 1944 he lived in Lithuania in hiding. As part of that application, Balsys swore that the information contained in his application for Immigrant Visa and Alien Registration was true. The application also included a declaration that Balsys understood that if he made any willfully false or misleading statements or concealed any material fact, and he entered the United States, he could be subject to criminal prosecution and/or deportation.

OSI is an arm of the Criminal Division of the United States Department of Justice. It was created to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals. It claims to have evidence that Balsys assisted the Nazi forces occupying Lithuania during World War II and that he persecuted Jews and other civilians as a member of the Lithuanian Security Police. If Balsys did assist the Nazi forces and persecute Jews and other civilians, he might be eligible for deportation, pursuant to 8 U.S.C. §§ 1182(a)(3)(E), 1251(a)(4)(D), for persecuting persons because of their race, religion, national origin or political opinion, as well as pursuant to 8 U.S.C. §§ 1182(a)(6)(c)(i), 1251(a)(1)(A), for lying on his immigration application.

In furtherance of its investigation of Balsys's wartime activities, OSI issued an administrative subpoena commanding Balsys to give testimony and to

produce documents relating to his activities during the war and to his immigration to the United States. Balsys appeared at a deposition, and provided his name and address; he then asserted the Fifth Amendment privilege and refused to answer all other questions. These questions addressed, *inter alia*, his residence in Europe during the war, his association with Lithuanian police units and political groups, and his knowledge of and participation in the adverse treatment of Jews and others during the Nazi occupation of Lithuania. The only document he produced was his alien registration card. The United States brought suit in the district court to enforce the administrative subpoena.

Balsys argued to the district court that he is entitled to assert the privilege against self-incrimination because his answers could subject him to prosecution by the governments of Lithuania, Germany, and Israel. The government argued that Balsys had not demonstrated a real and substantial fear of foreign prosecution, that the privilege is inapplicable where the claimant fears prosecution by a foreign government, and that Balsys had waived his privilege.

In *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996), the district court granted the petition for enforcement of the subpoena and ordered Balsys to testify. It held that Balsys does, in fact, face a real and substantial danger of foreign prosecution in Lithuania and in Israel because: (1) the responses OSI sought from Balsys could incriminate him under both Lithuania's statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II and Israel's law imposing the death penalty for those who committed crimes against the Jewish people, in countries

like Lithuania, during the Nazi regime; (2) Balsys's testimony would very likely be disclosed to Israel and Lithuania, since part of OSI's mandate is to "[m]aintain liaison with foreign prosecution, investigation and intelligence offices," Order of Att'y Gen. No. 851-79 (Sept. 4, 1979), since OSI has an agreement to collect and provide Lithuanian authorities with evidence on suspected Nazi collaborators, and since OSI has "shared similarly incriminative evidence with Israel in the past," *Balsys*, 918 F. Supp. at 596; and (3) if Balsys gives the answers OSI seeks, he could be deported to these countries.

The district court then considered whether Balsys could invoke the Fifth Amendment to avoid providing testimony and documents that might aid the potential foreign prosecutions. The court relied on *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), which stated:

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness.

Id. at 809. Following this reasoning, the district court held that Balsys could not invoke the privilege since the United States government sought his testimony out of a legitimate interest in a matter of do-

mestic law, namely, investigating Balsys's alleged lies on his application for entry:

> In declining to extend the Fifth Amendment privilege in the present case, the Court concludes that the fundamental purpose of the privilege is to protect individuals against governmental overreaching. Balsys seeks to assert the privilege as a means to thwart the enforcement of domestic law. This is contrary to the values the Fifth Amendment was intended to protect. Although Balsys may suffer harm as a result of the incriminating nature of the disclosure, the government has a valid purpose.
>
> . . .
>
> A contrary decision by this Court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. Accordingly, the Court concludes that Respondent is not entitled to invoke the Fifth Amendment privilege against compelled self-incrimination.

Balsys, 918 F. Supp. at 599-600.

Lastly, the district court held that even if Balsys were entitled to assert the privilege, he waived that privilege when he first applied for immigration. The court found that, in applying for a visa in 1961, Balsys initiated an immigration proceeding, that this proceeding remained open, and that the visa application and current OSI investigation were therefore parts of the same proceeding. Since voluntary statements

given on a subject during a single proceeding create an implied waiver with respect to that subject, the court found that Balsys had waived his Fifth Amendment privilege when, in his 1961 application, he answered questions concerning his activities during World War II. *See id.* at 600.

On appeal, Balsys challenges the district court's conclusion that he may not invoke the Fifth Amendment privilege to avoid giving evidence that could be used against him in a foreign prosecution, and denies that he waived the privilege when he completed the visa application before his entry to the United States. Neither party challenges the finding that Balsys has a real and substantial danger of prosecution by Lithuania and Israel, and an uncertain risk of prosecution by Germany.

DISCUSSION

I. The Privilege Against Self-Incrimination and the Fear of Foreign Prosecution

The Fifth Amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend V. Resident aliens, like Balsys, have the same rights under the Fifth Amendment as citizens, *see Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 & n.5 (1953), and thus may invoke the privilege to the same extent as citizens. The privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," in which the witness reasonably believes that the information sought, or the evidence discovered as a result of that information, could be used against him in a subsequent criminal prosecution. *Kastigar v.*

United States, 406 U.S. 441, 444-45 (1972); *see also Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The deposition at which Balsys asserted the privilege was part of an investigation into whether Balsys is deportable. Since a deportation proceeding is a civil action and not a criminal prosecution, *see INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984), Balsys does not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him. He would, nevertheless, clearly have a right to refuse to answer the questions if the information could be used against him in a criminal case in the United States. Balsys does not claim to be at risk of such domestic criminal prosecution. Instead, he asserts (and the government does not deny on appeal) that he has a real and substantial fear of prosecution by Lithuania and Israel. The language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions. The privilege would therefore seem to apply to Balsys. The government nevertheless argues that the Fifth Amendment privilege does not protect against self-incrimination in foreign criminal trials. And so the question facing this court is whether fear of foreign prosecution gives Balsys the right to refuse to answer questions in a domestic deportation proceeding.

A. *Direct Case Law*

In answering this question, we have no explicit guidance from either the Supreme Court or from this court. Although the issue was before the Supreme Court in *Zicarelli v. New Jersey State Comm'n of*

Investigation, 406 U.S. 472 (1972),[1] the Court held that since no "real and substantial" risk of foreign prosecution existed in that case, it was unnecessary to decide the question. See id. at 478-81, 92 S.Ct. at 1674-76.[2] Since *Zicarelli*, and until this case, this court has never had to reach the issue, because each of the claimants advancing the argument lacked the real and substantial fear of foreign prosecution required by the Supreme Court. *See, e.g., United States v. Chevrier (In re Grand Jury Proceedings)*, 748 F.2d 100, 104-05 (2d Cir. 1984); *United States v.*

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[1] The Supreme Court had previously granted certiorari in a case in which a circuit court had held that a witness has no right to invoke the privilege to avoid incriminating himself in a foreign prosecution. But the court never ruled on this issue. *See Parker v. United States*, 397 U.S. 96, 96 (1970). Instead, it vacated and remanded the case to the Tenth Circuit with instructions to dismiss the appeal as moot. *Id.*

[2] In *Araneta v. United States*, 478 U.S. 1301 (1986), responding to an application for a stay of a contempt order pending certiorari, Chief Justice Burger, acting as Circuit Justice, briefly addressed the issue. He granted the stay on the ground that "there is a 'fair prospect' that a majority of this Court will decide the issue in favor of the applicants." *Id.* at 1304. Since the petition for a writ of certiorari was later denied, the stay was lifted, and the court did not consider the question. *See Araneta v. United States*, 479 U.S. 924 (1986).

Before the petition for certiorari in Araneta was denied, Justice Stevens, following the Chief Justice, also stayed the enforcement of a contempt order entered when a witness refused to testify at a deposition despite a grant of immunity because he feared that the testimony could be used against him in a criminal proceeding by the Soviet Union. *See Mikutaitis v. United States*, 478 U.S. 1306, 1308-09 (1986). On the same day certiorari was denied in *Araneta*, the Court vacated the stay entered by Justice Stevens. *See Mikutaitis v. United States*, 479 U.S. 911 (1986).

Gilboe, (In re Gilboe), 699 F.2d 71, 74-75 (2d Cir. 1983); *United States v. Flanagan (In re Flanagan)*, 691 F.2d 116, 121-22 (2d Cir. 1982).

Three other circuits have considered whether the Fifth Amendment privilege applies to fear of incrimination in foreign countries, and they have come to divergent conclusions.

In *United States v. (Under Seal) (Araneta)*, 794 F.2d 920 (4th Cir. 1986), the Fourth Circuit held that the Fifth Amendment does not protect a witness facing a substantial risk of foreign prosecution from compelled self-incrimination. It reasoned that when the Fifth Amendment applied only to the federal government, and not to the states, the Supreme Court had held that the amendment did not forbid the federal government from compelling testimony that would incriminate a witness under state law or forbid a state government from compelling testimony that would incriminate the witness under federal law. Since "[o]nly when the Fifth Amendment was held applicable to the states was the privilege held to protect a witness in state or federal court from incriminating himself under either federal or state law," the court concluded "that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination." *Araneta*, 794 F.2d at 926 (citation omitted). The Fourth Circuit has since reaffirmed this holding in *United States v. (Under Seal)*, 807 F.2d 374, 375-76 (4th Cir. 1986) (per curiam).

The Tenth Circuit also held in a brief opinion that the Fifth Amendment does not protect against self-incrimination for acts made criminal by the laws of a foreign nation. *See In re Parker*, 411 F.2d 1067 (10th

Cir. 1969), *vacated as moot sub nom., Parker v. United States*, 397 U.S. 96 (1970).[3] The court stated:

> The ideology of some nations considers failure itself to be a crime and could provide punishment for the failure, apprehension, or admission of a traitorous saboteur acting for such a nation within the United States. In such a case the words "privilege against self-incrimination," engraved in our history and law as they are, may turn sour when triggered by the law of a foreign nation.

Id. at 1070 (footnote omitted).

The Eleventh Circuit considered the issue in a case with facts very similar to those in the case before us. *See United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), *reh'g en banc granted, op. vacated*, 81 F.3d 1032 (11th Cir. 1996). Vytautas Gecas invoked the privilege during a deposition by OSI that was part of a investigation into whether Gecas, a resident alien, lied on his visa application in 1962 about his activities in Lithuania during World War II. Reasoning that the Fifth Amendment has multiple purposes, which include protecting individual dignity as well as preventing overzealous prosecution, a panel of the Eleventh Circuit permitted Gecas to invoke the privilege. Allowing the privilege where the fear of foreign prosecution is real and substantial promotes, the

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[3] Although the Tenth Circuit opinion in *Parker* was vacated, it remains persuasive authority to the Tenth Circuit. *See, e.g., Nigro v. United States (In re Grand Jury Proceeding 82-2)*, 705 F.2d 1224, 1227 (10th Cir. 1982). We consider the decision in this light. *See United States v. Gecas*, 50 F.3d 1549, 1563 n.22 (11th Cir. 1995), *reh'g en banc granted, op. vacated*, 81 F.3d 1032 (11th Cir. 1996).

court concluded, an appropriate balance between these purposes and the important government interest in domestic law enforcement. *See id.* at 1564-65.

A number of district courts, in this circuit and elsewhere, have also considered the question that the court faces today. In 1972, after the Supreme Court in *Zicarelli* had indicated that the issue remained open, Chief Judge Newman of this court, then a district court judge for the District of Connecticut, held that, when a witness has a reasonable fear of foreign prosecution, he can invoke the privilege against self-incrimination, despite a grant of use immunity. *See In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972). In reaching that conclusion, Judge Newman relied heavily on the earlier Supreme Court opinion in *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964). *See Cardassi*, 351 F. Supp. at 1084-86. His ruling was not appealed. Another member of this court also addressed this issue as a district court judge. In *In re Flanagan*, 533 F. Supp. 957 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d Cir. 1982), Judge McLaughlin, then of the Eastern District of New York, found that Martin Flanagan had a real and substantial fear of being prosecuted in the Republic of Ireland or in Northern Ireland for being a member of the Irish Republican Army, and went on to hold that the privilege could be invoked in the face of such a fear. *See id.* at 962-66. This court, however, held that the district court had erred in finding a real and substantial fear of foreign prosecution. We therefore reversed the district court without reaching the issue of the applicability of the privilege. *See Flanagan*, 691 F.2d at 121-22.

District courts in other circuits have also found the privilege to extend to fear of foreign prosecution.

See, e.g., Moses v. Allard (In re Moses), 779 F. Supp. 857, 870-83 (E.D. Mich. 1991) (refusing in a domestic bankruptcy proceeding to compel the testimony of a debtor who feared prosecution in Switzerland); *Yves Farms, Inc. v. Rickett*, 659 F. Supp. 932, 939-41 (M.D. Ga. 1987) (holding that a foreign citizen was entitled to invoke the Fifth Amendment privilege against private-party defendants seeking testimony on a collateral issue); *Mishima v. United States*, 507 F. Supp. 131, 135 (D.Alaska 1981) (relying on the analysis of English common law in *Murphy* to conclude that the privilege could be invoked where a real fear of foreign prosecution exists). And a number of district courts have found the privilege applicable in the particular context of OSI investigations. *See, e.g., United States v. Kirsteins*, No: 87-CV-964, 1989 WL 49796, at *10 (N.D.N.Y. May 10, 1989) (noting an earlier decision to allow the witness to invoke the privilege); *United States v. Trucis*, 89 F.R.D. 671, 673 (E.D. Pa. 1981) (Pollak, J.) (relying on Judge Newman's discussion in *Cardassi*). But other district courts have refused to allow the privilege to be invoked against questioning by OSI. *See, e.g., Lileikis*, 899 F. Supp. at 809 (holding that the privilege cannot be asserted if there is a governmental interest in enforcing domestic law and the witness's testimony furthers that interest).

Although the Supreme Court has not squarely addressed the issue faced by this court today, the Court has considered an analogous and related issue: whether "one jurisdiction in our federal structure may compel a witness to give testimony which might incriminate him under the laws of another jurisdiction." *Murphy*, 378 U.S. at 54. The Court's answer to this question guides us in two ways. First, like the

Supreme Court in *Murphy*, we will begin by considering the question in the light of the purposes of the Fifth Amendment, and then in the light of Supreme Court cases and of English common law. Second, the *Murphy* decision, in and of itself, provides considerable support for the holding that the Fifth Amendment protects Balsys from being compelled to testify.

B. *The Purposes of the Fifth Amendment*

Although the district court noted that the Fifth Amendment has a "role in preserving an individual's privacy and dignity," it determined "that the fundamental purpose of the privilege [against self-incrimination] is to protect individuals against governmental overreaching." *Balsys*, 918 F. Supp. at 598-99. The court went on to conclude that, since Balsys asserted the privilege in order to "thwart the enforcement of domestic law," and since "the government has a valid purpose," and there is no evidence of "malicious" or "'overzealous prosecution,'" allowing Balsys to assert the privilege would undermine the values the Fifth Amendment was intended to protect. *Id.* at 599.

We disagree.

The origins and history of the Fifth Amendment are complex and controversial. *See, e.g.*, Leonard W. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (1968); R.H. Helmholz, *Origins of the Privilege Against Self-incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. Rev. 962 (1990); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047 (1994); John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 Harv. L. Rev. 610 (1902).

And its purposes are myriad and difficult to divine. *See Murphy*, 378 U.S. at 56-57 n.5; Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 857-58 ("The Self-Incrimination Clause of the Fifth Amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights. From the beginning it lacked an easily identifiable rationale. . . . Today, things are no better: the clause continues to confound and confuse.").

Nevertheless, the Supreme Court has stated that its purposes include:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Murphy, 378 U.S. at 55, 84 S.Ct. at 1596 (citations and internal quotation marks omitted). We are told, therefore, that the Fifth Amendment serves three categories of purposes: it advances individual integ-

rity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes the systemic values of our method of criminal justice. Rather than attempt to determine a single cardinal purpose of the Fifth Amendment and consider the question before us only in relation to that purpose, as the district court essentially did, we are bound to recognize the multiple values that the Supreme Court has found the privilege against self-incrimination to serve, and to consider whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege "promotes or defeats [these] policies and purposes." *Id.*[4]

1. *Individual Dignity and Privacy Values*

Permitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the privilege in cases where the fear is of domestic prosecution. The Supreme Court has repeatedly emphasized the need to avoid imposing the "cruel trilemma" of self-accusation, perjury, or contempt, *see, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 595-97 (1990); *South Dakota v. Neville*, 459 U.S. 553, 561-64

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[4] [T]he privilege against self-incrimination represents many fundamental values and aspirations. . . . It will not do, therefore, to assign one isolated policy to the privilege and then to argue that since "the" policy may not be furthered measurably by applying the privilege [in a particular way], it follows that the privilege should not be so applied.

Murphy, 378 U.S. at 56-57 n. 5 (criticizing Wigmore's rejection of the applicability of the privilege where the prosecution is foreign).

(1983), and this trilemma is no less cruel nor any less imposed by a government within the United States merely because the testimony is ultimately used by a foreign nation. Nor is the threat to the "the human personality" and privacy any less serious simply because the compulsion serves the purposes of a foreign government. Finally, the privilege protects the innocent and better ensures the reliability of the testimony the United States seeks to compel regardless of whether the witness from whom the information is sought fears foreign or domestic prosecution, since self-incriminating statements are no more reliable in either case.

2. *Values of the American Criminal Justice System*

The systemic policies of American criminal justice that underly the Fifth Amendment are neither promoted nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution. Although we value an accusatorial system, a "fair state-individual balance" in criminal trials, and trial evidence of the highest reliability, *our* practice of these values is unaffected one way or the other when a witness fears foreign prosecution. This factor is, therefore, of no real significance in cases of this sort.

3. *Values of Preventing Governmental Overreaching*

The question of how applying the privilege in cases of fear of foreign prosecution affects the Fifth Amendment's purpose of avoiding governmental overreaching is more complicated. The district court reasoned that since Balsys faces no domestic prosecution, "there is no incentive for the government to elicit self-incriminating statements from Balsys by 'inhumane treatment and abuses.'" *Balsys*, 918 F. Supp.

at 599 (quoting *Murphy*, 378 U.S. at 55). Admittedly, there is less of a motive for a government to treat a witness inhumanely in order to extract admissions when that same government is not seeking to prosecute the witness. "Conviction hunger"[5] seems unlikely when the prosecution does not intend to eat. We believe, however, that the district court underestimated the danger that exists where the fear is of prosecution in foreign lands.

First, a domestic government's interest in extracting admissions in aid of foreign prosecutions is more analogous to a domestic jurisdiction's interest in the criminal prosecution of a witness by another domestic jurisdiction than it is to the situation in which the "extracting" government has no interest in prosecution at all. In *Murphy*, the Court suggested that the purpose of avoiding governmental abuse was best served by preventing states and the federal government from compelling testimony that might incriminate the witness in a court of another jurisdiction. This is because there is frequently a "cooperative federalism" between the several states and the nation, as a result of which the federal and state governments wage "a united front against many types of criminal activity." *Murphy*, 378 U.S. at 56.

International collaboration in criminal prosecutions has intensified admirably in recent years. *See New MLAT Treaties Increase DOJ's Reach*, 4 No. 7 DOJ Alert 7, April 18, 1994, (discussing rise in United

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[5] This is the label Wigmore used to describe the motive of a government to engage in "inhumane treatment of persons from whom information is desired." *See Murphy*, 378 U.S. at 56 n.5 (citing 8 J. Wigmore, Evidence § 2251, at 317 (McNaughton rev. ed. 1961)).

States cooperation with foreign nations to produce criminal evidence); Ethan A. Nadelman, *Cops Across Borders: the Internationalization of U.S. Criminal Law Enforcement* (1993); M. Cherif Bassiouni, *Policy Considerations on Inter-State Cooperation in Criminal Matters*, 4 Pace Y.B. Int'l L. 123, 130 (1992) (discussing the increase in cooperation among national and international police agencies since 1960's); Dominic Bencivenga, *International Antitrust Bilateral Pacts Seen As Crucial to Enforcement*, N.Y.L.J, December 12, 1996 at 5; *U.S. Mutual Legal Assistance Treaties Continue Proliferating*, Money Laundering Alert, 1996 WL 8687221 (May 1, 1996); Bruce Zagaris, *International Criminal and Enforcement Cooperation in the Americas in the Wake of Integration*, 3 Sw. J.L. & Trade Am. 1 (1996) (reviewing criminal enforcement cooperation mechanisms in the Americas). And what might be called "cooperative internationalism" has now begun to parallel the "cooperative federalism" described in *Murphy*. This eminently desirable development leads to the conclusion that, since the United States *does* have a significant stake in many foreign criminal cases, we can best avoid governmental abuse by allowing witnesses to avoid being compelled to answer questions posed by the government at home for fear of incriminating themselves abroad.

Second, as this case demonstrates, there is considerable correlation between the cases in which a witness is most likely to be able to demonstrate a real and substantial fear of foreign prosecution and the cases in which the purpose of preventing government overreaching would best be served by permitting the privilege. The United States government has manifested a substantial interest in the success of Bal-

sys's foreign prosecution, an interest that makes that foreign prosecution significantly more likely. For example, according to the district court—and neither party has challenged its analysis in this regard—Balsys has a real and substantial fear of foreign prosecution in large part precisely because (1) "OSI was created for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them," (2) "OSI has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania," and (3) OSI has exchanged incriminating evidence on suspected Nazi collaborators with Israel on past occasions. *See Balsys*, 918 F. Supp. at 595-97 (citing the order of the Attorney General establishing OSI, Order of Att'y Gen. No. 851-79 (Sept. 4, 1979), and a Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, August 3, 1992, U.S.-Lithuania); *see also Gecas*, 50 F.3d at 1557-61 (concluding that Gecas had a real and substantial fear of foreign prosecution for substantially the same reasons).

In the presence of such facts, it would be odd indeed to suggest that the United States government does not care about foreign prosecutions and hence that allowing witnesses to invoke the privilege does not discourage governmental overreaching. Indeed, it is precisely in cases in which the United States' interest is strongest that the evidence will most probably be shared. In the same cases, in part because of the sharing of evidence, the witness will most likely be

able to show a real fear of foreign prosecution. There is thus a strong correlation between the cases in which the government has an interest and the cases in which the witness will be able to use the privilege. It follows that permitting the privilege in such cases will help curb any tendency by the United States to take abusive measures just as it does in cases in which domestic prosecution is feared. For these reasons, we reject the district court's argument that allowing Balsys the privilege would not further the Fifth Amendment purpose of avoiding governmental overreaching.

The district court also erred when, following *Lileikis* it suggested that it is relevant to the application of the privilege that "[t]here is no indication that the government's motive is malicious, or that the government is engaging in overzealous prosecution." *Balsys*, 918 F. Supp. at 599. The *Lileikis* court held that as long as the United States has a legitimate need for a witness's testimony to further a governmental interest in enforcing domestic law, and there is no evidence of improper motivation, the privilege must yield. *Lileikis*, 899 F. Supp. at 808-09. This holding, however, is contrary to both the purposes and the structure of the protection provided by the Fifth Amendment.

The exact same argument—if it were valid—would apply to invocations of the privilege in cases of fear of domestic prosecution. In almost all situations in which a witness in a civil proceeding claims the privilege, there exists a significant domestic law interest in obtaining the information. And yet the privilege perdures. Similarly, it is rare in such cases that one can show either overzealous prosecution or improper motivation. But no such showing is required.

The privilege applies in such instances because the Fifth Amendment is fundamentally preventative. It prevents the government from using compelled testimony in the class of the cases—criminal prosecutions—in which the government's interest in the information might most tempt it to abuse witnesses. It does this at the cost of possibly limiting information gathering in other contexts, including civil cases. The point of the privilege is to *preempt* government abuse, rather than to seek to deter abuse by punishing it after it has occurred.

The question is not, therefore, as *Lileikis* suggests, whether the government can state some legitimate interest in the testimony it seeks, or whether governmental overreaching can be shown. It is rather whether cases involving fear of foreign prosecution—as a class—involve circumstances in which the application of the Fifth Amendment would preempt abuse and thereby promote constitutional goals. More directly, the question is whether, in this respect, cases involving fear of foreign prosecution differ significantly from cases involving domestic prosecutions. As we have noted, the United States will frequently have the same opportunity and the same temptations when a witness faces prosecution abroad as in cases involving fear of prosecution by another domestic jurisdiction. It follows that applying the privilege in both sets of cases achieves the same functions at the same costs. In both contexts, the Fifth Amendment inhibits the pursuit of government goals—in spite of their legitimacy and importance—in order to deny the government an inducement to use inappropriate methods to achieve those ends.

C. *The Supreme Court, English Common Law, and the Privilege Against Self-Incrimination*

In *United States v. Murdock*, 284 U.S. 141 (1931), the Supreme Court held that the federal government could compel a witness to give testimony that might incriminate him under state law. In support of this holding the Court cited English common law, stating "[t]he English rule of evidence against compulsory self-incrimination, on which historically, that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country." *Id.* at 149. Thirty-three years later (on the very same day that the Court held in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964), that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment), the Court in *Murphy* rejected the basis, the reasoning, and the holding of *Murdock*.

In *Murphy*, the Court held that the privilege against self-incrimination protects a witness in one domestic jurisdiction against being compelled to give testimony that could be used to convict him in another domestic jurisdiction. Part of the Court's justification for this rejection of the *Murdock* rule was that the *Murdock* Court had incorrectly stated the relevant English common law rule. The *Murdock* Court had asserted that the English common law rule could be found in *King of the Two Sicilies v. Willcox*, 1 Sim. (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851). The *Murphy* Court concluded instead that *United States of America v. McRae*, L.R., 3 Ch. App. 79 (Ch. App. 1867), which held that *where a witness is under threat of foreign prosecution the privilege applies as much as where the witness is exposed to that threat*

under English law, reflected "the settled 'English rule' regarding self-incrimination under foreign law." *Murphy*, 378 U.S. at 63. Thus, the *Murphy* Court rejected the conclusion that the "only danger to be considered is one arising within the same jurisdiction and under the same sovereignty." and ultimately "accept[ed] as correct the construction given the privilege by the English courts" namely, that the privilege may be invoked by witnesses attempting to avoid incriminating themselves abroad. *Murphy*, 378 U.S. at 68, 77-78 (internal quotation marks omitted).[6]

The Supreme Court's statement and acceptance of the English common law rule suggests that the Court has endorsed the proposition we accept today, that a witness may invoke the Fifth Amendment out of fear of a foreign prosecution. *See Trucis*, 89 F.R.D. at 673; *Mishima*, 507 F. Supp. at 134-35; *Cardassi*, 351 F. Supp. at 1085. *But see Parker*, 411 F.2d at 1070 (stating that the Supreme Court relied on English common law regarding foreign prosecutions only as an

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[6] It is evident from this analysis that the Supreme Court in *Murphy* believed *Murdock* to be incorrect *when it was written*. It did not simply find that *Murdock* became inapplicable in the light of subsequent legal developments. We therefore reject the Fourth Circuit's conclusion that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment. According to the Fourth Circuit's reasoning, *Murphy* would not have held the privilege to protect a witness from being compelled to testify in one domestic jurisdiction where the testimony could incriminate him in another if *Malloy* had not made the Fifth Amendment applicable to the states through the Fourteenth Amendment on the same day. *See Araneta*, 794 F.2d at 926. But the opinion in *Murphy* expressly (albeit in dicta) forecloses any such conclusion.

"argumentative analogy" to the relationship between the federal government and the states). Although the discussion of English common law in *Murphy* does not decide the case before us, as demonstrated by the fact that the Court considered the question an open one in *Zicarelli*, it does provide significant support for our conclusion. *See Araneta v. United States*, 478 U.S. 1301, 1303-04 (1986) (Chief Justice Burger acting as Circuit Justice in granting stay of contempt order) ("*Murphy v. Waterfront Comm'n of New York Harbor* contains dictum which, carried to its logical conclusion, would support" a ruling that "the privilege against self-incrimination protects a witness from being compelled to give testimony that may later be used against him in a foreign prosecution.") (citation omitted).[7]

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[7] Some commentators and courts have suggested that the English common law rule was less certain than *Murphy* indicated. *See Araneta*, 794 F.2d at 927; Randall D. Gyunn, Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 Va. L. Rev. 875, 893 (1983). Even assuming arguendo that this objection has merit, it is for the Supreme Court and not us to assess its significance. Moreover, the Supreme Court plainly recognized, in both *Murphy* and *Murdock*, that there is a strong analogy between a domestic jurisdiction compelling testimony that may be used by another domestic jurisdiction and a domestic jurisdiction compelling testimony that may be used by a foreign jurisdiction. *See Murphy*, 378 U.S. at 57-72, 77-78; *Murdock*, 284 U.S. at 149. Nothing about the Court's alleged error undermines that analogy. And there is no doubt that the Supreme Court continues to abide by the rule laid out in *Murphy* that the privilege may be invoked against a domestic jurisdiction seeking testimony that might incriminate in another domestic jurisdiction. Consequently, even if the Court were to retreat from its view on English law, it does not follow that it would fail to apply the

D. *Application of the Privilege and United States Enforcement of Domestic Law*

The district court viewed the potential effect of the privilege on domestic law enforcement as the primary obstacle to granting the privilege to those in Balsys's position. *See Balsys*, 918 F. Supp. at 599 ("[T]o allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications."). Other courts and commentators that have denied such witnesses the privilege have been similarly concerned that granting the privilege would allow the priorities of foreign prosecutions to inhibit domestic law enforcement. *See, e.g., Araneta*, 794 F.2d at 926 ("It would be intolerable to require the United States to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country."); *Lileikis*, 899 F. Supp. at 809 (stating that if the United States has a legitimate need for a witness's testimony, "[i]t would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness"); *Parker*, 411 F.2d at 1070; Diego A. Rotztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination*

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privilege in cases of fear of foreign prosecution. Since the *Murphy* rule persists, and since the Supreme Court has indicated that the issue before us is analogous to the issue decided in *Murphy*, it follows that, regardless of what the English rule on witnesses who face foreign prosecution in fact was, the *Murphy* rule, by itself, provides significant support for the conclusion that the privilege against self-incrimination may be invoked to avoid incriminating oneself in a foreign criminal case.

and Fear of Foreign Prosecution, 96 Colum. L. Rev. 1940, 1964 (1996).

This objection is significant because it contrasts the effects on domestic law enforcement of granting the privilege to those who fear criminal charges abroad with the effects of granting it to witnesses who fear prosecution at home. When a witness refuses to answer questions because he is afraid of domestic prosecution, the government is able to compel the testimony by offering the witness immunity from the use either of the testimony or of its fruits in a subsequent domestic criminal prosecution. *See Kastigar*, 406 U.S. at 449, 459. This immunity is enforced by the courts. Once a defendant establishes that he has testified under a grant of immunity, the court will exclude evidence in subsequent criminal proceedings unless the government proves that the evidence it proposes to use comes from a legitimate source independent of the compelled testimony. *See id.* at 460. Where a witness fears foreign criminal proceedings, under current law, the United States cannot grant effective immunity since our courts cannot ensure the exclusion of evidence from prosecutions abroad. Because allowing the privilege in the latter case allegedly deprives the government of the means of compelling testimony, the result is said to be an unacceptable encroachment on the government's law enforcement efforts.

We find the strength of this objection to be exaggerated, and we conclude that it does not justify denying those who fear foreign prosecution the right to use the privilege.

The fact that allowing the privilege has costs for domestic law enforcement is not by itself a constitutional argument for disallowing the privilege. *See*

Cardassi, 351 F. Supp. at 1086 ("Of course, a constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights.").

> The effective enforcement of a well-designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.

Feldman v. United States, 322 U.S. 487, 489, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408 (1944). It is the duty of the courts to enforce constitutional protections despite their costs.

It might nevertheless be argued that in deciding whether a constitutional right exists, a court may consider the effect that such a finding will have on legitimate government needs. For example, it could be said that, if the application of the privilege against self-incrimination that we consider today has a much greater negative effect on domestic law enforcement than does the traditional application of the privilege, this disparity might itself be relevant to what the words of the Framers should be taken to mean. The premise of this argument, however—that the interpretation of the privilege that we accept today would have a significantly greater adverse effect on the United States's ability to pursue domestic

law enforcement goals than does its traditional application—is dubious.

1. *The Conflict Rarely Arises*[8]

In the first place, the circumstances giving rise to application of the privilege in cases involving foreign prosecutions rarely occur. Since the Supreme Court refused to consider the constitutional question twenty-five years ago in *Zicarelli*—finding that the witness had not established a real and substantial fear of foreign prosecution—only a handful of witnesses have managed to demonstrate such a fear. *See Gecas*, 50 F.3d at 1556-62; *Araneta*, 794 F.2d at 923-25; *United States v. Ragauskas*, No. 94 C. 2325, 1995 WL 86640, at *3-4 (N.D. Ill. 1995); *Moses*, 779 F. Supp. at 861-870; *Trucis*, 89 F.R.D. at 673; *Mishima*, 507 F. Supp. at 132-33; *Cardassi*, 351 F.Supp. at 1083-84. In most cases, courts have found that the danger is "remote and speculative" and, hence, insufficient to justify the application of the privilege. *See, e.g., Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1064-65 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *United States v. Joudis*, 800 F.2d 159, 163-64 (7th Cir. 1986); *In re President's Comm'n on Organized Crime*, 763 F.2d 1191, 1198-99 (11th Cir. 1985); *Chevrier*, 748 F.2d at 104-05 (2d Cir. 1984); *Gilboe*, 699 F.2d at 75-78; *Flanagan*, 691 F.2d at 121-24; *Nigro*, 705 F.2d at 1226-28; *In re Baird*, 668

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[8] Judge Meskill in his opinion concurring in the result disassociates himself with this section because he deems it unnecessary to a resolution of this appeal. He is, of course, quite right that this section would not be needed if the appeal were to be resolved in the way that he suggests. This section is not superfluous, however, given the grounds of decision adopted by the majority.

F.2d 432, 434 (8th Cir. 1982); *United States v. Yanagita*, 552 F.2d 940, 946-47 (2d Cir. 1977); *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972).

This is likely to continue to be the case, as it is difficult to establish a real and substantial fear of criminal prosecution abroad. For example, one important factor in determining whether a witness has a real and substantial fear of foreign prosecution is whether, by extradition or deportation, he would likely "be forced to enter a country disposed to prosecute him." *Gecas*, 50 F.3d at 1560; *see also Balsys*, 918 F. Supp. at 596; *Flanagan*, 691 F.2d at 121. And few witnesses are, in fact, subject to either deportation or extradition.

Only aliens may be deported. See 8 U.S.C. § 1227.[9] And extradition generally requires the existence of an authorizing treaty. *See United States v. Alvarez-Machain*, 504 U.S. 655, 664 (1992); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936). Moreover, even if an extradition treaty exists linking the United States and the country in which a witness fears prosecution, the witness can be extradited to that country only for acts that would also be criminal in the United States.[10] For these reasons,

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[9] It is also possible for the United States to bring a denaturalization proceeding to revoke the citizenship of a witness under some circumstances, such as where the citizenship was illegally procured or procured by concealment of a material fact. *See* 8 U.S.C. § 1451. After a witness is denaturalized, he may be deported as an alien. This process, however, generally takes much longer than extradition.

[10] Traditionally, extradition treaties included a list of specific crimes for which extradition was provided. More recent extradition treaties negotiated by the United States require that the alleged crime for which extradition is requested be a crime in both countries *See* Marian Nash, *Modernization of Extradition Treaties*, 86 Am. J. Int'l L. 547, 547 (1992); M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 320, 324-27 (2d ed. 1987); *LoDuca v. United States*, 93 F.3d 1100, 1111-12 (2d Cir.), cert. denied, 117 S.Ct. 508 (1996).

It follows that the fear expressed in *Parker* that strange foreign criminal laws could result in denying the United States access to testimony, *see Parker*, 411 F.2d at 1070, is unfounded since in such cases it is very unlikely that the witness would ever be forcibly subject to the jurisdiction threatening to prosecute him. *See* Moshe M. Sukenik, Note, *Testimony Incriminating Under the Laws of a Foreign Country—Is There a Right to Remain Silent?*, 11 N.Y.U. J. Int'l L. & Pol. 359, 369 (1978).

and because of other barriers to showing a real and substantial fear of foreign prosecution, the class of witnesses who are likely to be eligible for the privilege under the interpretation Balsys advocates is very limited.

In the second place, even where a real and substantial fear of prosecution is established, allowing the witness to invoke the privilege would often have little effect on domestic law enforcement. A witness may only use the privilege in response to questions the answers to which might "in themselves support a conviction" or "furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). He may not maintain a general silence. Since the United States's interests in domestic law enforcement concern primarily *domestic* activities and foreign prosecutions concern primarily *foreign* activities, when what a witness fears is foreign prosecution, the information sought by the United States will usually not fall within the scope of the silence that

the Fifth Amendment allows to that witness. *See Cardassi*, 351 F. Supp. at 1086.

In the third place, since an adverse inference may be drawn in civil cases when a witness invokes the privilege, that very invocation often aids the government's case at the same time that it deprives the government of the testimony it sought. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Supreme Court made clear that while the Fifth Amendment precludes the drawing of adverse inferences against defendants in criminal cases, it "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318. "This is so even though, as in *Baxter*, the government is a party to the action and would benefit from the drawing of the inference." *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (citing *United States v. Ianniello*, 824 F.2d 203, 208 (2d Cir. 1987)).

It follows, for example, that since a deportation hearing is a civil proceeding, *see Lopez-Mendoza*, 468 U.S. at 1038-39, a resident alien, like Balsys, who refuses to answer questions that might incriminate him abroad takes a chance that he will create a negative inference that may be used in conjunction with other evidence to deport him. Invoking the privilege in the face of incriminating questions is probably not, *by itself*, sufficient to justify depriving a person of an important liberty interest. *See Superintendent v. Hill*, 472 U.S. 445, 455 (1985). And freedom from deportation is such an interest. *See United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927). But if there is other evidence, the witness's silence may contribute to a decision to deport the alien. *See United States v. Stelmokas*, 100

F.3d 302, 311 (3d Cir.1996) (stating that adverse inferences could be drawn in a denaturalization proceeding against an alleged Nazi collaborator from fact that he invoked his privilege against self-incrimination "as long as there was independent evidence to support the negative inferences beyond the invocation of the privilege against self-incrimination"), *cert. denied*, 1997 WL 221308 (U.S. May 27, 1997). The possibility of drawing adverse inferences, thus substantially reduces the effects on government law enforcement efforts of applying the privilege to those who fear incriminating themselves in foreign prosecutions.

Finally, the witness's testimony may not be the only source of the information the government seeks. And although the government might prefer to obtain the information directly from the witness, it may often be able to achieve its law enforcement goals by relying entirely on other sources of evidence.

2. *Parallels to Immunity Statutes May Be Enacted*

Nevertheless, we assume that there do exist a number of cases in which the testimony sought by the government will be (a) within the scope of the privilege possessed by a witness (b) who genuinely fears prosecution abroad, (c) in circumstances in which the witness's failure to testify would affect the government's interests adversely. There are domestic legal areas in which the United States has an important interest in a witness's testimony about events that occurred overseas. The present case provides the most common example. When a resident alien is alleged to have lied about criminal activities in which he engaged in a foreign country, the United States may have a strong interest in excluding him from the United States, and the other country may have

a strong interest in prosecuting him.[11] *See, e.g.*, *Balsys*, 918 F. Supp. at 592-97; *Gecas*, 50 F.3d at 1553-62. And even with a negative inference against him, the government may not have sufficient evidence to deport the witness without his own testimony.

We do not doubt, therefore, that applying the privilege to those who fear foreign prosecution will have some constraining effect—albeit less than the government suggests—on the government's pursuit of testimony. Even in such cases, however, the government can do much to minimize the costs to its law enforcement efforts, enough, indeed, so that those costs become analogous to those that occur in domestic prosecutions. For methods may exist by which the United States can constitutionally bypass the privilege either by eliminating the likelihood that the witness will be sent to the jurisdiction that would prosecute him, or by granting some form of constructive immunity to the witness.

As we have indicated previously, in cases involving fear of domestic prosecution, immunity statutes have

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[11] Resident aliens suspected of Nazi activities are particularly likely to be able to establish a real and substantial fear of foreign prosecution because deportation from the United States may not be optional, *see* 8 U.S.C. §§ 1251(a)(4)(D), 1253(h); *Linnas v. INS*, 790 F.2d 1024, 1029 & n.1 (2d Cir. 1986) ("The deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result."); *Balsys*, 918 F. Supp. at 596 (discussing mandatory deportation of Nazi persecutors), and because some countries have no statute of limitations on such crimes. *See, e.g.*, Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477 (1992) (Lithuania), *as translated* in Joint Appendix at 207 (indicating that Lithuania joins the November 26, 1968 Convention for the Non-Applicability of a Statute of Limitations for War Crimes and Crimes Against Humanity).

become, over time, not only "a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify," but also "'part of our constitutional fabric.'" *Kastigar*, 406 U.S. at 446-47 (quoting *Ullmann v. United States*, 350 U.S. 422, 438 (1956)). And while the government must provide protection "as comprehensive as the protection afforded by the privilege," *Kastigar*, 406 U.S. at 449, the Supreme Court has not stated that the combination of use and derivative-use immunity and the exclusionary rule is necessarily the only method for achieving this.[12] The

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[12] A number of courts have suggested that Federal Rule of Criminal Procedure 6(e)(2), which establishes the general rule that grand jury testimony is secret, eliminates any reasonable ground for fearing foreign prosecution, and therefore prevents grand jury witnesses who fear foreign prosecution from invoking the privilege. *See, e.g., In re Baker*, 680 F.2d 721, 721 (11th Cir. 1982) (per curiam); *Baird*, 668 F.2d at 433; *United States v. Brummitt*, 665 F.2d 521, 524-26 (5th Cir. 1981); *United States v. Smith (In re Campbell)*, 628 F.2d 1260, 1262 (9th Cir. 1980); *United States v. Lemieux (In re Federal Grand Jury Witness)*, 597 F.2d 1166, 1167 (9th Cir. 1979) (per curiam); *United States v. Postal (In re Grand Jury Proceedings)*, 559 F.2d 234, 236-37 (5th Cir. 1977); *In re Long Visitor*, 523 F.2d 443, 447 (8th Cir. 1975); *United States v. Weir (In re Weir)*, 495 F.2d 879, 881 (9th Cir. 1974); *Tierney*, 465 F.2d at 811; *Parker*, 411 F.2d at 1069-70. *But see Araneta*, 794 F.2d at 925 (finding "the contrary authority to be more compelling"); *Chevrier*, 748 F.2d at 103-04; *Flanagan*, 691 F.2d at 123-24. Grand jury secrecy has many exceptions, however, and even when no exception applies, it largely depends on the largess of government officials who have access to grand jury minutes and of grand jurors who "might consciously or inadvertently leak confidential information." *Flanagan*, 691 F.2d at 123; *see also Cardassi*, 351 F. Supp. at 1082-83; *In re Flanagan*, 533 F. Supp. 957, 964-65 (E.D.N.Y.), *rev'd on other grounds*, 691 F.2d 116 (2d

way may be open, therefore, for the adoption of analogies to immunity statutes that would grant equivalent protection to witnesses whose fear is of foreign prosecutions.

While we need not pass on the constitutional sufficiency of any particular measures today, we note that extradition and deportation are not fixed practices. Congress may regulate extradition.[13] *See* 18 U.S.C.

Cir. 1982). Furthermore, "[a]lthough unauthorized disclosure of grand jury testimony is punishable by contempt, such *post hoc* penalties provide little protection for the witness" who is jeopardized by the disclosures. *Flanagan*, 533 F. Supp. at 965; *see also Flanagan*, 691 F.2d at 123; *Cardassi*, 351 F. Supp. at 1082. For these reasons, among others, we have deemed grand jury secrecy a constitutionally inadequate form of protection for those who fear foreign prosecutions. *See Chevrier*, 748 F.2d at 103-04; *Flanagan*, 691 F.2d at 123-24; *accord Tierney v. United States*, 410 U.S. 914, 916 (Douglas, J., dissenting from denial of certiorari) (stating that grand jury secrecy is insufficient protection to negate real fear of foreign prosecution because "[t]here are inumerable circumstances in which access to grand jury testimony can be had").

[13] Extradition treaties are self-executing, and therefore do not require implementing legislation to be binding as law. *See* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."); *Terlinden v. Ames*, 184 U.S. 270, 288 (1902) (stating that extradition treaties are self-executing); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."). Nevertheless, Congress may change of the law of the land by statute, even when doing so is inconsistent with a treaty previously in existence. *See Clark v. Allen*, 331 U.S. 503, 508-09 (1947); *Grin v. Shine*, 187 U.S. 181, 191 (1902) ("[N]otwithstanding [an extradition] treaty, Congress has a perfect right to

§§ 3181-3196. And the executive branch has substantial discretion over extradition both by statute and through its role in negotiating treaties. *See* U.S. Const. art. II, § 2 (stating that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); 18 U.S.C. § 3186 (stating that it is within the Secretary of State's discretion to determine whether an accused person is actually extradited); *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir.), *stay denied*, 117 S.Ct. 1491 (1997) (noting that procedures for extradition are governed by statute and that the Secretary may decline to extradite a witness "on any number of discretionary grounds, including but not limited to, humanitarian and foreign policy considerations"). Like extradition, deportation is also regulated by statutes, many of which give considerable discretion to the executive. *See* 8 U.S.C., Ch. 12.

It follows that Congress can pass laws regulating extradition and deportation in cases involving the privilege, just as it has enacted immunity statutes in the past to deal with fear of domestic prosecution.[14]

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provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient."); *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893) ("In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty.").

[14] It is noteworthy that the first federal immunity statute was not passed until 1857, and that it then applied only to those who testified before Congress or its committees. Act of Jan. 24,

For example, Congress could provide that no one who has been compelled to testify despite a well-founded fear of prosecution in a given country will be deported or extradited to that country (or to countries empowered to so extradite him). *See Flanagan*, 691 F.2d at 124 (suggesting that a law prohibiting the extradition of a witness who gives testimony pursuant to a grant of immunity would negate the real and substantial

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1857, 11 Stat. 155. Many additional federal immunity statutes have been passed since the 1857 Act. And the scope of the testimony covered by these statutes has expanded over the course of more than a century. *See generally*, Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1571-78, 1611-12 (1963) (recounting the history of federal immunity statutes). But the costs to the government of the privilege notwithstanding, the Fifth Amendment was in full force long before these statutes became commonplace.

In deciding on the applicability of the privilege to those who fear foreign prosecution, we are thus in a position analogous to that of courts that, before immunity was available, interpreted the privilege with respect to domestic prosecution. These courts were not deterred by the costs to government law enforcement of permitting the privilege. *See, e.g., United States v. Burr (In re Willie)*, 25 F. Cas. 38, 39-40 (C.C.D. Va. 1807) (No. 14692E) (Chief Justice Marshall—acting as Circuit Justice in the trial of Aaron Burr—construing the scope of the Fifth Amendment privilege for the first time and rejecting the government's argument that the privilege should apply only when the answer to the question would be sufficient to convict the witness of a crime). Indeed, they even overturned early immunity statutes, despite the effect that doing so would have on domestic law enforcement. *See Counselman v. Hitchcock*, 142 U.S. 547, 564, 586 (1892) (considering the constitutionality of a federal immunity statute for the first time and declaring it unconstitutional because it did "not afford absolute immunity against future prosecution for the offence to which the question relates").

risk of prosecution).[15] Both Congress and the executive branch may thus be able to limit dramatically the domestic law enforcement costs of the interpretation of Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes.[16]

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[15] Unless supplemented by some form of judicial enforcement, however, it is unlikely that such constructive immunity would be sufficient to accord witnesses the scope of protection guaranteed by the Constitution. *See Kastigar*, 406 U.S. at 461. And care is required if courts are to be able to enforce any such grant of constructive immunity in the context of extradition. For example, although the executive branch may make an extradition conditional, the courts cannot. *See, e.g., Kin-Hong*, 110 F.3d at 110; *Emami v. United States Distr. Ct.*, 834 F.2d 1444, 1453-54 (9th Cir. 1987). In this respect too, we find ourselves today in a very similar situation to that of the courts that considered the applicability of the privilege in cases involving domestic prosecutions before immunity statutes had been held to be constitutionally valid. *See supra* note 13.

[16] Of course, such changes in deportation and extradition practices would, to some extent, limit the freedom of the United States to deport or extradite as it chooses. In this respect, however, they simply parallel the effect, in domestic cases, of immunity statutes that greatly limit the government's capacity to prosecute the witness. And it is difficult to argue that foregoing a criminal prosecution is not as great a self-imposed limitation as foregoing the right to deport or to extradite a witness to the specific land the government would prefer. In any event, in both instances the limitation is self-imposed by the government in exchange for getting the testimony it seeks.

For related reasons, we find the suggestion by some courts that this application of the privilege undermines the sovereignty of the United States entirely unconvincing. *See, e.g., Araneta*, 794 F.2d at 926; *Balsys*, 918 F. Supp. at 599; *Lileikis*, 899 F. Supp. at 809. Since deportation and extradition are controlled by statute and executive discretion in the same way that

We conclude that the negative effect on domestic enforcement efforts of allowing the privilege is of the same order when the witness fears foreign prosecution as when he fears domestic prosecution, and is, in any event, not substantial enough to undermine the fact that granting the privilege to those who fear foreign prosecution is consistent with the language of the Fifth Amendment, with its aims, and with the reasoning of the most relevant Supreme Court cases. Like the panel in *Gecas*, we therefore believe that this application of the privilege "reasonably serves the purposes of the privilege and preserves the goals of domestic law enforcement." *Gecas*, 50 F.3d at 1565.

II. WAIVER

Balsys also alleges that the district court erred by holding that even if he were entitled to the protection of the Fifth Amendment, he waived his privilege when he first applied for immigration.

A witness may relinquish his Fifth Amendment privilege against self-incrimination. *See, e.g., Garner v. United States*, 424 U.S. 648, 654 n.9 (1976). A waiver need not be knowing and voluntary. *See id.* For instance, when a witness makes voluntary statements on a subject, he implicitly waives any subsequent claim of the privilege with respect to that subject. *See Rogers v. United States*, 340 U.S. 367, 373 (1951). However, "a waiver of the privilege in one proceeding

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domestic criminal law prosecution is, the privilege may be invoked by those who fear foreign prosecution only under the same circumstances as it may be used by those who fear domestic criminal proceedings, that is, when the government has passed laws and exercised discretion (or failed to do so) in such a manner as to make some criminal proceeding a real threat.

does not affect the rights of a witness or the accused in another independent proceeding." *United States v. Miranti*, 253 F.2d 135, 139 (2d Cir. 1958); *see also United States v. Housand*, 550 F.2d 818, 821 n.3 (2d Cir. 1977) (same); *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979) (same); *United States v. Cain*, 544 F.2d 1113, 1117 (1st Cir. 1976) (same); *United States v. Lawrenson*, 315 F.2d 612, 613 (4th Cir. 1963) (same). *But see Ellis v. United States*, 416 F.2d 791, 800 (D.C. Cir. 1969) (declining to adopt, under the circumstances of that case, the prevailing rule that waiver of privilege in one proceeding does not affect rights in another proceeding).

On his visa application in 1961, Balsys voluntarily answered questions, under oath, concerning his activities during World War II. The district court found that, by answering such questions, Balsys waived his right to refuse to answer the questions OSI seeks to ask him now. It held that the visa application in 1961 and the OSI deportation hearing today are part of the same immigration proceeding.

The law of this circuit, however, does not support this result. Two proceedings must be considered separate where "during the period between the successive proceedings conditions might have changed creating new grounds for apprehension (e.g., the passage of new criminal laws) or that the witness might be subject to different interrogation for different purposes at the subsequent proceeding." *Miranti*, 253 F.2d at 140. Thus, when time passes and circumstances change between a waiver and a subsequent appearance, the initial waiver may not be applied to the subsequent event. *See, e.g., id.* (holding that "two appearances before the same grand jury separated by indictment and conviction for crimes

related to the original disclosures and the passage of nearly a year" are not a single proceeding).

Decades have passed since Balsys's application for a visa, and there have been substantial intervening changes in immigration law, in immigration procedures, and in the criminal law of Lithuania, Israel, and the United States. For example, Lithuania, which became an independent state in 1990, passed the retroactive statute under which Balsys fears prosecution in 1992. *See* Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477 (1992) (Lithuania), *as translated* in Joint Appendix at 207. We therefore conclude that Balsys's deportation hearing and his visa application are separate proceedings, and that any waiver Balsys may have made with respect to the visa application is not applicable to the questions asked by OSI.

Even if the visa application and deportation hearing constituted the same proceeding for Fifth Amendment purposes, we are doubtful that Balsys could have waived his privilege against self-incrimination in 1961 with respect to his activities during World War II. When Balsys completed his visa application, he had no Fifth Amendment rights:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment.

Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (internal quotation marks and citation omitted). It is problematic, to say the least, to suggest that Balsys could have implicitly waived constitutional rights that he did not yet possess.

CONCLUSION

Because we do not find a significant difference in the harm to governmental interests from granting the privilege to those who fear foreign prosecutions, and to those who fear domestic prosecution, because the reasons for allowing the privilege are similar in both situations, and because the language of the amendment does not distinguish between the two, we hold that the Fifth Amendment privilege against self-incrimination may be invoked by a witness who possesses a real and substantial fear of foreign prosecution. Since Balsys is such a witness, and since we find that the district court erred in concluding that Balsys waived his right to invoke the privilege with respect to the current immigration investigation, we vacate the district court's order compelling compliance with the government's administrative subpoena and remand for proceedings consistent with this opinion.

BLOCK, District Judge, with whom Judge Calabresi joins, concurring:

I concur fully in Judge Calabresi's opinion, which I join. I also write separately, however, to express my concern, triggered by Judge Meskill's concurrence in the result, that our decision today may be perceived as qualifying the privilege in cases involving a real and substantial fear of foreign prosecution based upon

a case-by-case analysis of domestic law enforcement interests. According to Judge Meskill, the determinant in such an *ad hoc* scenario should be the balance to be struck between the enforcement of our organic laws and the protection that the Fifth Amendment privilege affords to the affected individual.

This relativist approach echoes the holding of *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), relied upon by the district court in this case. In *Lileikis*, the court attempted to stake out an intermediate position between the approach taken by the Court of Appeals for the Fourth Circuit in *United States v. (Under Seal) (Araneta)*, 794 F.2d 920 (4th Cir. 1986), which did not permit invocation of the privilege, and that of the Eleventh Circuit in *United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), in which the privilege was permitted to be invoked. The *Lileikis* court, attempting "to borrow constructively" from both opinions, 899 F. Supp. at 808, held that where a witness invokes the privilege based upon a real and substantial fear of foreign prosecution, the privilege should nonetheless give way "[i]f a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest. . . ." *Id.* at 809. At the same time, however, the court also determined that it was inappropriate to "bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable, by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindication of the domestic laws of the United States." *Id.*

In my opinion, the privilege against self-incrimination is too principled a proposition to be

dependent upon the quantification of governmental interests and the unpredictability of *ad hoc* adjudication. There is nothing in the lexicon of Fifth Amendment jurisprudence that supports the thesis that, barring waiver, factors other than a legitimate fear of prosecution should enter into its calculus. While the debate on this issue, which has been taunting the courts ever since *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964) were decided in 1964, will continue until resolved by the Supreme Court, it seems to me that one must bite the conceptual bullet—either the privilege can be invoked by one facing a real and substantial fear of foreign prosecution, or it cannot—rather than grapple with balancing and qualifying the privilege's application.

In opting for its unqualified application, I am satisfied that the concerns of Judge Meskill and others over compromising the efficacy of domestic law enforcement will invariably be subsumed by the factors that enter into the threshold determination of the legitimacy of the fear, and some very practical realities.

In determining whether the requisite real and substantial fear of foreign prosecution exists, this court has identified five factors for consideration:

> whether there is an existing or potential foreign prosecution [against the witness]; what foreign charges could be filed against [the witness]; whether prosecution of them would be initiated or furthered by [the witness's] testimony; whether any such charges would entitle the foreign jurisdiction to have [the witness] extradited from the United States; and whether there is a likelihood

> that [the witness's] testimony given here would be disclosed to the foreign government.

United States v. Flanagan, 691 F.2d 116, 121 (2d Cir. 1982); *see also United States v. Chevrier*, 748 F.2d 100 (2d Cir. 1984); *United States v. Gilboe*, 699 F.2d 71 (2d Cir. 1983). The fear "must be a real and reasonable one, based on objective facts as distinguished from [the witness's] subjective speculation." *Flanagan*, 691 F.2d at 121; *Gecas*, 50 F.3d at 1553-66 (application by Eleventh Circuit of test similar to *Flanagan*). This rigorous test, requiring consideration, *inter alia*, of the likelihood that a witness's testimony would be disclosed to the foreign government and whether the foreign prosecution would be initiated or furthered by the testimony, *see Flanagan*, 691 F.2d at 121, will undoubtedly uncover those situations, such as *Gecas* and the present case, where the government is actively involved in facilitating a foreign prosecution and the risk of governmental overreaching is, therefore, sufficiently acute to warrant invocation of the privilege. But the test is also sufficiently rigorous to "eliminate[] the apprehension that a person could manufacture a potential for foreign prosecution or raise this specter solely to frustrate domestic law enforcement." *Gecas*, 50 F.3d at 1564. I agree, therefore, with the panel's rationale and conclusion in *Gecas*:

> Just as the privilege is extended to prevent overzealous prosecution and to constrain the government, the privilege creates in the individual the freedom to remain silent where the testimony may be adverse to his penal interests. One purpose need not eclipse the other in its function. If the court reasonably finds that the

> fear of foreign prosecution is an actuality rather than a mere speculation, the individual should prevail and be permitted to invoke the privilege. If the prospect of foreign prosecution is pure conjecture, then the importance of domestic law enforcement prevails, and the witness must testify. . . . [S]uch a balance both reasonably serves the purposes of the privilege and preserves the goals of domestic law enforcement.

Id. at 1564-65.

In any event, in a very real sense, I am not at all certain that the goals of domestic law enforcement would be significantly enhanced if the privilege could not be asserted. It simply cannot pragmatically be assumed that when faced with the "cruel trilemma of self-accusation, perjury or contempt," the choice would invariably be self-accusation. Balsys, for example, would obviously choose domestic contempt over foreign execution and it is unlikely, therefore, that the government would ever elicit from him the answers to its questions. The only practical domestic goal at stake would be the enforcement of our contempt laws, which are quite charitable. Had we held today that Balsys could not invoke the privilege, he initially would only be subject to civil contempt for his expected and rational silence. 28 U.S.C. § 1826(a) (1994); *Simkin v. United States*, 715 F.2d 34 (2d Cir. 1983). However, a court's authority to impose civil contempt sanctions "is limited by the concept that such sanctions are by their nature coercive rather than punitive." *United States v. Giraldo*, 822 F.2d 205, 210 (2d Cir. 1987); *see also United States v. Doe (In re Grand Jury Proceedings)*, 862 F.2d 430, 432 (2d Cir. 1988). By statute, the duration of a witness's

civil confinement for a refusal to testify in court is not permitted to exceed the duration of the court proceeding, or 18 months, whichever is shorter. 28 U.S.C. § 1826(a). Further, as a matter of common law, if it becomes clear during the witness's period of imprisonment that "there is no reasonable possibility that the sanction imposed for civil contempt will have the desired coercive effect, the sanction should be ended." *Giraldo*, 822 F.2d at 210; *see also Simkin*, 715 F.2d at 36-37; *Soobzokov v. CBS, Inc.*, 642 F.2d 28, 31 (2d Cir. 1981). Similarly, although the court is empowered to assess a fine, the fine cannot continue after the court has determined that the fine is not having a coercive effect. *See Soobzokov*, 642 F.2d at 31. As for criminal contempt pursuant to 18 U.S.C. § 401, while it is available once it is determined that the civil contempt remedy is unavailing, *see Simkin*, 715 F.2d at 37, it is unlikely to result in a prolonged period of incarceration. *See id.* at 38 ("fear may warrant lenient sentence of criminal contempt") (citing *Harris v. United States*, 382 U.S. 162, 166-67 (1965)).

In sum, for a witness facing a real and substantial fear of foreign prosecution, and foreign punishment, the choice of contempt may be preferable to the fate that awaits him abroad. Consequently, it is by no means assured that a different holding today would have a markedly different impact upon domestic law enforcement. To the extent that it does, the relinquishment of the enforcement of our contempt laws, such as they are, strikes me as a civilized trade-off for upholding a fundamental principle of individual dignity.

Judge Calabresi authorizes me to say that he concurs in this opinion.

MESKILL, Circuit Judge (concurring in the result):

I concur in the result.

OSI's mission is the investigation and institution of denaturalization and deportation proceedings of suspected Nazi war criminals. The issuance of the administrative subpoena here was in furtherance of that mission. The district court correctly concluded that the answers to the questions posed, if incriminating, would be shared with the government interested in prosecuting Balsys, and Balsys likely would be deported to Lithuania.

Thus, in this case the government's main interest in enforcing its organic laws is in facilitating a foreign prosecution. Therefore, in balancing the government's interest in domestic law enforcement with Balsys' interest in the protection the Fifth Amendment privilege affords, Balsys' interest is the weighty one. The Fifth Amendment protects Balsys' individual dignity and privacy, protects him against our government's pursuit of its goals by excessive means, and promotes the values of our justice system.

However, our decision today should not be interpreted as *carte blanche* for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution. Other scenarios may call for a different result. Therefore, rather than determining today that "cooperative internationalism" rises to the level of "cooperative federalism," and therefore causes concern for government overreaching in cases when a witness fears foreign prosecution and that there is a correla-

tion between real fear of foreign prosecution and government overreaching, as the majority opinion does, our decision should be limited to the facts before us and to OSI proceedings.

I also dissociate myself from that part of the majority opinion entitled "The Conflict Rarely Arises," because it is speculative and unnecessary to a resolution of this appeal. I also cannot support the discussion entitled "Parallels to Immunity Statutes May Be Enacted." The role of the judiciary is to decide cases, not to suggest to the Executive and Legislative branches of government ways to solve problems that our decision today may cause in the future. I believe it is better to limit our decision to the facts of this case and I concur in the result reached with the understanding that courts will interpret our decision in this limited way.

APPENDIX B

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6144

UNITED STATES OF AMERICA, PETITIONER-APPELLEE

v.

ALOYZAS BALSYS, RESPONDENT-APPELLANT

[Filed Sept. 25, 1997]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the Appellee United States of America, and the panel that heard the appeal having filed an opinion on July 15, 1997,

IT IS HEREBY ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
George Lange III, Clerk
By:

/s/ BETH J. MEADOR
BETH J. MEADOR
Administrative Attorney

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. NEW YORK

No. 93 Misc. 227 (SJ).

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS, RESPONDENT

[Filed: Mar. 5, 1996]

MEMORANDUM AND ORDER

JOHNSON, District Judge:

Pursuant to Section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1225(a), as amended, the United States seeks to enforce an administrative subpoena issued by the Director of the Office of Special Investigations (the "OSI").[1] The subpoena was issued in conjunction with the OSI's civil investigation into Aloyzas Balsys's ("Respondent" or "Balsys") immigration and entry into the United States.

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[1] The OSI, an arm of the Criminal Division of the Department of Justice, was created by Attorney General Benjamin R. Civiletti in 1979 to investigate and institute denaturalization and deportation proceedings against suspected Nazi war criminals. *See* Order of the Attorney General, No. 851-79, September 4, 1979.

BACKGROUND

Aloyzas Balsys is a resident alien presently living in Woodhaven, New York. He was born on February 6, 1913 in Ansieniai, Plateliai Province, Lithuania and entered the United States on June 30, 1961 pursuant to Section 221 of the Immigration and Naturalization Act. In connection with his application to enter the United States, Balsys swore that the information contained in his application for Immigrant Visa and Alien Registration was true.[2] The OSI contends that Balsys lied in his immigration application about his activities during World War II.[3] Specifically, the OSI claims to have information and evidence that Balsys assisted the Nazi forces then occupying Lithuania, and that he participated in the persecution of persons because of their race, religion, and/or political opinion. If this information had been available to the government when Balsys applied for entry into the United States, his application would most likely have been denied. Now that Respondent is in the United States, this information, if true, would likely subject him to deportation.

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[2] Balsys's visa application stated, in relevant part:

> I understand that any willfully false or misleading statement or willful concealment of a material fact made by me herein may subject me to permanent exclusion from the United States and, if I am admitted to the United States, may subject me to criminal prosecution and/or deportation. Respondent's Application for Immigrant Visa and Alien Registration, Exhibit D to the Government's Petition.

[3] On his application, Balsys stated that between 1934 and 1940, he served in the Lithuanian Army, and from 1940 to 1944, he lived in Plateliai, Lithuania, and was "in hiding from N.K.V.D. and . . . Chairman of Municipality." *Id.* at p. 2.

In furtherance of its investigation into Balsys' wartime activities, the OSI issued an administrative subpoena commanding him to give testimony and to produce documents relating to his immigration to the United States, and to his activities in Europe between 1940 and 1945. In response, Balsys appeared at a deposition, and, after providing his name and address, asserted a Fifth Amendment privilege as to all other questions. He also refused to produce the documents described in the subpoena, with the exception of his alien registration card.

Balsys contends that he is entitled to the protection afforded by the Fifth Amendment based on his fear that answering the government's questions could subject him to prosecution by the governments of Lithuania, Germany and Israel. The United States challenges Balsys's assertion of the Fifth Amendment privilege on three grounds: (1) that Balsys has not demonstrated a real and substantial fear of foreign prosecution; (2) that, even if Balsys had shown a real fear of prosecution abroad, the Fifth Amendment privilege is not applicable when a claimant fears prosecution on the part of a foreign government; and (3) waiver.

For the reasons set forth below, this Court concludes that Balsys does in fact face a real and substantial danger of foreign prosecution. The Court also finds that, under the facts of the present case, the Fifth Amendment privilege does not provide protection against fear of incrimination under foreign law. Even if the Fifth Amendment were applicable to Balsys, this Court finds that his representations to the immigration authorities in 1961 constituted a waiver of those rights.

DISCUSSION

I. The Fifth Amendment Privilege

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." This privilege against self-incrimination "not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L.Ed. 1118 (1951).

The privilege protects both witnesses and defendants in any proceeding, whether civil or criminal. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). The witness may invoke the privilege, however, only if he "has reasonable cause to apprehend danger from a direct answer." *Hoffman*, 341 U.S. at 486, 71 S.Ct. at 818. A reasonable fear is one based on a prospect of penal liability that is "real and substantial" and not merely speculative. *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 478, 92 S. Ct. 1670, 1675, 32 L.Ed.2d 234 (1972). *See also Marchetti v. United States*, 390 U.S. 39, 53, 88 S. Ct. 697, 705, 19 L.Ed.2d 889 (1968) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.").

The Fifth Amendment privilege against self-incrimination is available to resident aliens as well as

to American citizens. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 & n. 5, 73 S. Ct. 472, 477-78 & n. 5, 97 L.Ed. 576 (1953).[4] Balsys has no reason to fear domestic prosecution in this case,[5] and indeed he has not alleged any such fear. Rather, he charges that forcing him to testify regarding his activities during World War II and his immigration to the United States could subject him to prosecution by the governments of Lithuania, Germany and Israel. Thus, the issue before the Court is whether Balsys can avoid complying with the OSI subpoena by asserting the Fifth Amendment privilege against self-incrimination based on a fear of foreign prosecution.

II. Fear of Foreign Prosecution

To date, neither the Supreme Court nor the Second Circuit has decided the question of whether the Fifth Amendment privilege against self-incrimination can be asserted on the grounds of fear of foreign prosecution. In *Zicarelli v. New Jersey Investigation*

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[4] In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064, 108 L.Ed.2d 222 (1990), the Supreme Court limited its decision in *Kwong Hai Chew* to holding that a "resident alien is a 'person' within the meaning of the Fifth Amendment," but the Fourth Amendment prohibition against unlawful searches and seizures does not apply extraterritorially to aliens.

[5] 18 U.S.C. § 3282 establishes a five year statute of limitations for concealment of material fact or the making of false or fraudulent statements under 18 U.S.C. § 1001. Since Balsys entered the United States on June 30, 1961, the statute of limitations has long since run for any criminal charge that could have arisen from his immigration.

Commission, 406 U.S. 472, 92 S. Ct. 1670, 32 L.Ed.2d 234 (1972), the Supreme Court granted certiorari to consider this question but then determined that it was unnecessary because Zicarelli's fear of being prosecuted by a foreign court was remote and speculative. *Id.* at 478, 92 S. Ct. at 1675.[6] The court held that, assuming a fear of foreign prosecution is within the scope of the privilege, a witness can assert the privilege only after establishing that the information sought would tend to incriminate him under foreign law and pose a substantial risk of foreign prosecution. *Id.* at 480-81, 92 S. Ct. at 1676-77.

A. Real and Substantial Fear

In *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 121 (2d Cir. 1982), the Second Circuit identified a number of factors that bear on whether the witness's fear of foreign prosecution is real or imaginary. In making this determination, the Court should "focus on questions such as whether there is an existing or potential foreign prosecution of him; what foreign charges could be filed against him;

[6] Similarly, the Second Circuit has failed to reach the question of whether the Fifth Amendment privilege against self-incrimination may be invoked on the ground of potential foreign prosecution. *See In re Grand Jury Witness Gilboe*, 699 F.2d 71, 78 (2d Cir. 1983) (not necessary to decide Constitutional question because immunized grand jury witness's alleged fear of foreign prosecution was "at best speculative and remote"); *In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 124 (2d Cir. 1982) (not necessary to decide Constitutional question because immunized grand jury witness "failed to demonstrate any real or substantial risk of foreign prosecution").

whether prosecution of them would be initiated or furthered by his testimony; whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and whether there is a likelihood that his testimony given here would be disclosed to the foreign government." *Id.*

Here, there is no existing foreign prosecution of Balsys. Balsys claims, however, that the testimony sought by the OSI would incriminate him under the laws of Lithuania, Germany and Israel, thereby subjecting him to potential prosecution.[7] In order to

[7] For example, some of the questions posed to Balsys by OSI are as follows:

Q: Where were you when the Soviets occupied Lithuania in June of 1940, Mr. Balsys?

Q: Mr. Balsys, what did you do during the Soviet occupation of Lithuania?

Q: Mr. Balsys, where were you in June of 1941 when the Germans occupied Lithuania?

Q: What did you do during the German occupation of Lithuania?

Q: When did you join the Villiaus Saugumas?

Q: Who is the commanding officer of the Villiaus Saugumas? Transcript of Deposition of Aloyzas Balsys, November 16, 1993, at p. 8.

Q: While you served in the Saugumas, did you work in the Communist and Jews section?

Q: Were you responsible for the arrest and imprisonment of Jews?

Q: While you served in the Villiaus Saugumas, did you work in the Polish section?

determine whether Balsys's answers would incriminate him, the Court must review the relevant criminal provisions from each sovereign.[8]

Q: Were you responsible for the arrest and imprisonment of Poles? *Id.* at p. 9.

Q: During the time that you served in the Villiaus Saugumas, did you work in the investigations section?

Q: Did you turn prisoners over to the Special Detachment? *Id.* at p. 10.

Q: At the time you applied to immigrate to the United States, why didn't you tell the U.S. Vice Consul in Liverpool that you had served in the Villiaus Saugumas?

Q: Were you afraid if you told the truth you would not be allowed to immigrate to the U.S.? *Id.* at p. 11.

Balsys refused to answer any of these questions, asserting the Fifth Amendment privilege. He also refused to answer questions directed at eliciting general biographical information, such as whether he is employed, whether he collects social security, and his present state of health. *See id.* at p. 4-5.

[8] The Court bases its discussion on foreign laws and treaties submitted by the Respondent. The government argues that Respondent has not provided any certified copies of the laws and treaties mentioned, and has failed to provide certified translations of the foreign language documents submitted. In addition, the government argues that Respondent offers no proof that the laws and treaties he cites are currently applicable.

Notwithstanding its objections, however, the government does not assert that the translations submitted by Respondent are inaccurate or that the foreign laws cited are invalid. The Court also notes that counsel for Respondent submitted virtually the same set of foreign laws, treaties and translations in *United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995), and the Eleventh Circuit relied on these submissions in its opinion.

In 1992, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II.[9]

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[9] Lithuania's "Law Concerning Responsibility for Genocide of the People of Lithuania" provides in pertinent part:

The Supreme Council of the Republic of Lithuania . . .

declaring that a policy of genocide and crimes against humanity was carried out against the populace of Lithuania during the period of occupation by Nazi Germany and the period of occupation and annexation by the USSR, in accordance with the generally recognized rule of the international community, that the destruction of people for any reason is perceived to be a crime, passes this law.

Article 1

Actions which strive, completely or in part, to physically destroy people who belong to any particular national, ethnic, racial or religious group, and which manifest themselves through the murder of members of these groups, brutal torture, physical maiming, mental retardation; the deliberate creation of such living conditions through which it is strived to completely or in part destroy persons from these groups; the forcible transfer of children from these groups to others or the use of means which seek to forcibly limit the birth rate (genocide)—

are punishable by incarceration for five to fifteen years along with the confiscation of belongings and property or by the death penalty along with the confiscation of belongings and property.

Article 2

The murder or torture of people in Lithuania, the deportation of her people, executed during the period of occupation by Nazi Germany or the period of occupation and annexation by the USSR, conform to the definition of crimes of genocide as indicated in the norms of international law.

The statute provides for punishments ranging from five years imprisonment to death. Law Concerning Responsibility for Genocide of the People of Lithuania, No. 1-2477, Article 1 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7. The law is retroactive, and there is no statute of limitations for prosecution of these crimes. *Id.*

In 1992, Lithuania also formed a commission to investigate crimes of genocide committed against the Lithuanian people during World War II when the country was under occupation by Germany and the Soviet Union. Resolution In re The Application of the Law "Concerning Responsibility for Genocide of the People of Lithuania," No. 1-2478 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7. In creating this commission, the Supreme Council of Lithuania resolved to enter into agreements with the United States, Israel and other states "for judicial assistance in cases involving the investigation of crimes of genocide." *Id.* In light of the above, the Court finds that the responses sought from Balsys by OSI could show that he engaged in conduct punishable under Lithuania's genocide law.

Article 3

> The law "Concerning Responsibility for Genocide of the People of Lithuania" is retroactive. A statute of limitations is not applicable in those criminal cases where individuals committed the actions described in this law up until the date it comes into force.

Law Concerning Responsibility for Genocide of the People of Lithuania, Num. 1-2477 (1992) (Lithuania), *as translated in* Appendix to Respondent's Memorandum at Tab 7.

Germany's murder statute, [StGB] Article 211, reads as follows:

Article 211 Murder

> (1) A murderer shall be punished by imprisonment for life.
>
> (2) A murderer is a person who kills another person from thirst for blood, satisfaction of his sexual desires, avarice or other base motives in a malicious or brutal manner or one dangerous to public safety or in order to permit the commission or concealment of another criminal act.

Article 211, *reprinted in* Adalbert Ruckerl, The Investigation of Nazi Crimes 1945-1978, at 41-42 (Derek Rutter, trans., 1979). Germany has prosecuted persons suspected of crimes against Jewish people under this statute, which apparently has no statute of limitations, for murders that occurred during World War II. It is not clear, however, whether this statute is applicable to non-German citizens alleged to have committed the punishable acts outside the territorial jurisdiction of Germany.[10]

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[10] In support of his contention that he has a reasonable fear of prosecution in Germany, Balsys has submitted a 1982 correspondence between former United States Attorney General William F. Smith and the former German Minister of Justice Jurgen Schmude. Appendix to Respondent's Memorandum at Tab 10. In that letter, Attorney General Smith recognized that "there [are] discrete legal questions in cases [regarding the extradition] of non-German citizens who acted beyond German borders." *Id.*

In addition, Balsys points to the case of Albert Helmut Rauca as an example of the German murder statute's applicability to non-German citizens accused of aiding and abetting the Nazis

If the statute does not cover crimes committed outside of Germany by non-German citizens, then the testimony sought by the OSI would not be incriminating to Balsys under German law.

Israel's "Nazis and Nazi Collaborators (Punishment) Law," 3710-1930 (1950) (Israel), applies extraterritorially and imposes the death penalty for persons who, "during the period of the Nazi regime, in an enemy country," committed crimes against Jewish people.[11] Thus, the responses sought from

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in territories occupied by Germany during World War II. Balsys asserts that Rauca, a non-German citizen residing in Canada, was extradited to Germany. Once there, he was tried for crimes that allegedly took place in Lithuania. Respondent's Memorandum at 11. Balsys also cites the case of Hermine Ryan, who was accused of being an S.S. Supervisory Warden at the Lublin Concentration Camp in Poland and was extradited from the United States to Germany in 1973. *See In re Ryan*, 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973). The Court notes, however, that the record does not reflect any direct evidence of these prosecutions.

[11] The Nazis and Nazi Collaborators (Punishment) Law, 3710-1930, states in pertinent part:

> 1. (a) A person who has committed one of the following offences—
>
> (1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;
>
> (2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;
>
> (3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime, is liable to the death penalty.

Balsys by the OSI could incriminate him under Israeli law.

Although Germany's potential to prosecute Balsys remains unclear, the Court finds that if Balsys answered the OSI as anticipated his testimony would inevitably tend to incriminate him under both Lithuanian and Israeli law. Therefore, the Court concludes that there is the potential that Balsys could be prosecuted abroad despite the fact that no such prosecution has yet been initiated. Specifically, Balsys could be charged under Lithuania's Law Concerning Responsibility for Genocide of the People

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> (b) In this section—
>
> "crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
>
> (1) killing Jews;
>
> (2) causing serious bodily or mental harm to Jews;
>
> (3) placing Jews in living conditions calculated to bring about their physical destruction; . . .
>
> (7) inciting to hatred of Jews; "crime against humanity" means any of the following acts:
>
> murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;
>
> "war crime" means any of the following acts: murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

Appendix to Respondent's Memorandum at Tab 14.

of Lithuania and under Israel's Nazis and Nazi Collaborators (Punishment) Law.

Under *Flanagan*, the Court must also consider the likelihood that Balsys's testimony would be disclosed to the governments of Lithuania and Israel. The OSI was created for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them. The Attorney General's order establishing the OSI states that the OSI shall:

1. Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or in association with the Nazi government of Germany, its allies, and other affiliated governments, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion;

2. Investigate, as appropriate, each allegation to determine whether there is sufficient evidence to file a complaint to revoke citizenship, support a show cause order to deport, or seek an indictment or any other judicial process against any such individuals;

3. Maintain liaison with foreign prosecution, investigation and intelligence offices;

4. Use appropriate Government agency resources and personnel for investigations, guidance, information, and analysis; and

5. Direct and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United

States Attorneys Offices, and other relevant Federal agencies.

Order of Atty. Gen. 851-79 (Sept. 4, 1979).

In addition, the OSI has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania. *See* Memorandum of Understanding Between the United States Department of Justice and the Office of the Procurator General of the Republic of Lithuania Concerning Cooperation in the Pursuit of War Criminals, August 3, 1992, U.S.-Lithuania [hereinafter "Memorandum of Understanding"]. This agreement states, in part, that:

> . . . [T]he United States Department of Justice agree[s] to provide . . . legal assistance concerning the prosecution of persons suspected of having committed war crimes in World War II in Lithuania and who are now residents of the United States—to facilitate the interview of witnesses, the conduct of other necessary activities, the collection of documentary materials and other information relevant to these investigations.

Memorandum of Understanding. The government claims that, to date, no country has expressed an interest in Balsys. This argument is inapposite. Whether or not Lithuania has to date expressed an interest in Balsys, the Court finds that his testimony here would in fact be disclosed based on the terms of the Memorandum of Understanding.

Similarly, the Court finds that there is a substantial likelihood that Balsys's testimony would be disclosed to Israel. Although the Court is not aware of any specific agreement between the United States

and Israel regarding the exchange of such information, the OSI has shared with Israel incriminating evidence that it gathered on suspected Nazi collaborator Ivan Demjanjuk. *See United States v. Gecas*, 50 F.3d 1549, 1558 (11th Cir. 1995). Given the OSI's duty to "maintain liaison with foreign prosecution, investigation and intelligence offices" and the fact that it has shared similarly incriminating evidence with Israel in the past, it appears that the OSI would in all probability disclose Balsys's testimony to Israel.[12]

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[12] The Court rejects the government's contention that a sealing order would eliminate Balsys's real and substantial fear of foreign prosecution. *Cf. United States v. (Under Seal) (Araneta)*, 794 F.2d 920, 924-25 (4th Cir.) (rejecting ability of protective order issued by the district court pursuant to Fed. R. Crim. P. 6(e) to protect witnesses from disclosure of grand jury testimony to foreign government because of foreign relations and importance of case), *cert. denied*, 479 U.S. 924, 107 S. Ct. 331, 93 L.Ed.2d 303 (1986); *In re Cardassi*, 351 F. Supp. 1080, 1082 (D.Conn.1972) (rejecting Fed. R. Crim.P. 6(e)'s ability to protect witness from disclosure of grand jury testimony to foreign government). Although the government has not requested that the Court place a sealing order on the deposition and transcripts, it would not oppose the issuance of such an order. The government asserts that a sealing order would ensure that the information gained from Balsys's testimony would not be disclosed to Israel or Lithuania.

In support of its argument, the government relies on the Seventh Circuit's decision in *In re Contempt Petition (Mikutaitis)*, 800 F.2d 159 (7th Cir. 1986). In that case, the OSI sought to depose Mikutaitis, who was of Lithuanian descent, as part of discovery in a denaturalization proceeding being conducted against another alleged Nazi collaborator in the Middle District of Florida. Despite a grant of immunity pursuant to 18 U.S.C. sec. 6002, Mikutaitis asserted the Fifth Amendment privilege based on his fear of prosecution by the Soviet Union for war crimes. The district judge assigned to the denaturalization case had attempted to shield Mikutaitis through a grant of immunity and an order that the deposition be put under seal.

Finally, under the *Flanagan* test the Court must consider the possibility that Balsys could be extradited from the United States to a foreign jurisdicion capable of prosecuting him. If Balsys is found to have lied about his activities during World War II on his visa application, he could be deported. If, in turn, Balsys is found to be deportable, the Attorney General of the United States has no discretion to prevent his deportation. *See* 8 U.S.C. §§ 1251(a)(4)(D), 1253(h) (designating participants in the Nazi persecution of persons during World War II "deportable aliens" and removing Attorney General's discretion

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The Seventh Circuit affirmed the district court's decision finding Mikutaitis in contempt for refusing to be deposed. *Id.* The court held that Mikutaitis was sufficiently protected by the safeguards ordered by the Florida court. In so ruling, the court reasoned that Mikutaitis had presented no evidence in support of his claim that the district court could not effectively limit access to the deposition or that "one of the parties, namely the OSI, is under some form of pressure to ignore the court's order and share the information . . ." *Id.* at 163.

The Court finds that the present case is distinguishable. The Seventh Circuit's decision in *In re Contempt Petition (Mikutaitis)* was based on the underlying premise that the OSI was under no pressure to disregard the sealing order. Here, Balsys has established that the OSI is indeed likely to disclose his testimony pursuant to the terms of the Memorandum of Understanding with Lithuania. *See also Gecas*, 50 F.3d at 1559 (rejecting the ability of a sealing order to protect witness where the OSI was under significant pressure to disclose the testimony based on the OSI's stated mission and the Memorandum of Understanding with Lithuania). Therefore, there is a substantial likelihood that any testimony provided by Balsys would be disclosed to Lithuania even if the deposition and transcript are sealed.

from withholding deportation); *Linnas v. I.N.S.*, 790 F.2d 1024, 1029 & n. 1 (2d Cir.) ("The deportation of Nazi persecutors is required even though the deportee's life or freedom might be threatened as a result."), *cert. denied*, 479 U.S. 995, 107 S. Ct. 600, 93 L.Ed.2d 600 (1986). The deportation of Balsys would thus amount to *de facto* extradition. *See Gecas*, 50 F.3d at 1560 (upholding district court's finding that deportation of the defendant, a suspected Nazi collaborator, was *de facto* extradition because defendant "would be forced to enter a country disposed to prosecute him").

The government contends that even if it secures an order deporting Balsys, he may designate the country to which he wishes to be deported. As the Eleventh Circuit reasoned in *Gecas*, however, Balsys's right to designate the country to which he would be sent "is subject to the Attorney General's discretionary conclusion 'that deportation to such country would be prejudicial to the interests of the United States.'" *Id.* (citing 8 U.S.C. § 1253(a)). Even if the Attorney General were to approve Balsys's country designation, that country could refuse to accept him because he is a suspected Nazi collaborator. If rejected by his designated country, Balsys would be sent to the country of which he is a citizen. *See* 8 U.S.C. § 1253(a). Thus, there is no guarantee that Balsys would be deported to the country of his choice.

Accordingly, under the *Flanagan* factors, the Court is persuaded that Balsys faces a "real and substantial" danger of prosecution by Lithuania and Israel. The Court must now consider whether Balsys may assert his Fifth Amendment privilege to avoid testifying.

B. Application of the Fifth Amendment

The Courts of Appeals which have considered the constitutional question of whether the Fifth Amendment privilege provides protection for a witness once it has been determined that he has a reasonable fear of foreign prosecution have reached different conclusions. The Fourth Circuit and the Tenth Circuit have held that a fear of foreign prosecution is not a sufficient basis for invoking the Fifth Amendment privilege. *See United States v. (Under Seal) (Araneta)*, 794 F.2d 920, 926-28 (4th Cir.) (the Fifth Amendment may not be invoked by a witness who fears foreign prosecution unless that foreign country also honors the privilege against self-incrimination), *cert. denied*, 479 U.S. 924, 107 S. Ct. 331, 93 L.Ed.2d 303 (1986) [hereinafter *Araneta*]; *In re Parker*, 411 F.2d 1067, 1069-70 (10th Cir. 1969) (holding that Fed. R. Crim. P. 6(e) would prevent disclosure of witness's testimony to foreign officials, thereby negating fear of foreign prosecution, and, alternatively, that "the fifth amendment provides no shelter . . . against incrimination in a foreign jurisdiction" where federal domestic immunity has been granted), *vacated as moot sub nom. Parker v. United States*, 397 U.S. 96, 90 S. Ct. 819, 25 L.Ed.2d 81 (1970).

In *Araneta*, the daughter and son-in-law of former Philippine President Ferdinand Marcos asserted the Fifth Amendment privilege and refused to testify before a grand jury investigating possible corruption in arms contracts with the Philippines. The Aranetas claimed that although they had been granted use and derivative use immunity (18 U.S.C. §§ 6002, 6003) and were thus protected from domestic

prosecution, their answers to the grand jury would incriminate them in a pending prosecution in the Philippines. Applying the factors set forth by the Second Circuit in *Flanagan*, the court concluded that the Aranetas had established a real fear of prosecution in the Philippines.

Despite the Aranetas' reasonable fear of foreign persecution, the court held that they could not claim the Fifth Amendment privilege before the grand jury "[s]ince the Fifth Amendment would not prohibit the use of compelled incriminating testimony in a Philippine court." *Araneta*, 794 F.2d at 926. In so ruling, the court reasoned that just as "[c]omity among nations dictates that the United States not intrude into the law enforcement activities of other countries conducted abroad," the United States' own sovereignty would be compromised if it were required "to forego evidence legitimately within its reach solely because a foreign power could deploy this evidence in a fashion not permitted within this country." *Id.*

The Eleventh Circuit, on the other hand, has held that the Fifth Amendment may be asserted by an individual on the basis of a fear of foreign prosecution. *See United States v. Gecas*, 50 F.3d 1549 (11th Cir. 1995). In *Gecas*, the defendant, also an alleged Nazi collaborator, claimed that the answers sought by the OSI in a deportation proceeding would incriminate him under the laws of Germany, Israel and Lithuania. Reversing the lower court's decision that the Fifth Amendment protection was not applicable to the defendant, the Eleventh Circuit "reject[ed] the district court's contention that the privilege *only* protects an individual's freedom from government

overreaching . . ." *Id.* at 1564, finding instead that "the Fifth Amendment privilege supports two goals: constraining the government from overzealous prosecution of individuals and securing individual liberties." *Id.* at 1562. The court based its holding on the notion that the Fifth Amendment privilege is "a personal right; [and] . . . a matter of individual dignity." *Id.* at 1564.

The district courts which have considered this issue have also varied in their conclusions. Several district courts have found that a fear of foreign prosecution is a valid basis for applying the Fifth Amendment. *See Mishima v. United States* 507 F. Supp 131, 134-35 (D. Alaska 1981) (privilege available to Japanese seaman being investigated in grounding of vessel); *United States v. Trucis* 89 F.R.D. 671, 673-74 (E.D. Pa. 1981) (privilege may be applied only "to those questions posing a real threat of incrimination," but not to questions about entry into the U.S. or naturalization proceedings); *United States v. Kowalchuk*, Civil Nos. 77-118 and 77-119 (E.D. Pa. October 20, 1978) (privilege applicable in denaturalization proceedings against brothers alleged to have achieved citizenship by concealing their participation in persecution of Jews in Poland on their visa application).

In a recent case in the District of Massachusetts, however, Judge Stearns held that "the government's purpose and need in seeking to compel a witness's testimony" must be examined in order to determine whether the witness may invoke the Fifth Amendment privilege based on a fear of foreign prosecution. *United States v. Lileikis*, 899 F. Supp. 802, 809 (D.

Mass. 1995). In that case, the government commenced a civil action to rescind the defendant's citizenship. In his answer to the complaint, the defendant, who was accused of committing acts of genocide in his native Lithuania, invoked the Fifth Amendment privilege against self-incrimination and refused to admit or deny the government's substantive allegations. Borrowing from both the *Araneta* and the *Gecas* opinions, the court concluded that:

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, the privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness. . . . On the other hand, I agree that a court of the United States should not bend the Constitution solely to promote the foreign policy objectives of the executive branch, however laudable, by compelling the cooperation of a witness in a proceeding that does not have as its fundamental purpose the vindication of the domestic laws of the United States.

Lileikis, 899 F. Supp. at 809.

Within the Second Circuit, Judge Newman, then sitting in the District of Connecticut, held in *In re Cardassi*, 351 F. Supp. 1080, 1081 (D. Conn. 1972), that the Fifth Amendment privilege is applicable where a witness fears foreign prosecution. That case involved

a grand jury witness who had been granted use immunity pursuant to 18 U.S.C. § 6003. The witness claimed the right to invoke the Fifth Amendment privilege based on her fear that, despite domestic use immunity, her testimony could be used against her in a foreign prosecution. The court reasoned that since the Supreme Court has construed the Fifth Amendment privilege to have the same scope under the United States Constitution as it has in England, where it applies to fear of foreign prosecution, the privilege can be claimed in proceedings in the United States by a witness who fears prosecution abroad. *Id.* at 1086.

With deference, this Court declines to follow the Eleventh Circuit's decision in *Gecas*. The Court is not unmindful of the Fifth Amendment's role in preserving an individual's privacy and dignity. *See Gecas*, 50 F.3d at 1564-65. This Court is of the opinion, however, that the *Gecas* holding allows foreign law to unreasonably infringe on domestic activity. This Court is similarly not persuaded by *In re Cardassi*. Instead, the Court finds the reasoning set forth by Judge Stearns in *Lileikis* persuasive given the facts of this case.

Balsys is a resident alien who allegedly entered the United States under false pretenses. The OSI seeks testimony from Balsys in conjunction with its investigation as to whether, on his application for an entry visa, he lied about his activities during World War II. Thus, the specific issue before the Court is whether an individual who was granted entry into the United States based on the government's reliance on the truthfulness of the sworn statements on his visa application can now take refuge in the Fifth

Amendment privilege and escape verifying the answers he gave on the document that served as his passport to America.

The Fifth Amendment is not applicable extra-territorially. *See Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936, 94 L.Ed. 1255 (1950). It serves to regulate the relationship between federal and state governments and their citizens. The Supreme Court has stated that the privilege against self-incrimination reflects

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."

Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55, 84 S. Ct. 1594, 1597, 12 L.Ed.2d 678 (1964) (citation omitted). This Court agrees with the Fourth Circuit that these values would not be vitiated by a decision declining to extend the privilege against self-incrimination in the present case. *See Araneta*, 794 F.2d at 926 ("Our decision that the Aranetas cannot find shelter in the Fifth Amendment does not imperil [the] values [underlying the Fifth Amendment]."). Balsys does not face the possibility of domestic prosecution, thus there is no incentive for the government to elicit self-incriminating state-

ments from Balsys by "inhumane treatment and abuses." *Murphy*, 378 U.S. at 55, 84 S. Ct. at 1597. Moreover, because the United States Constitution is not applicable in Israel or Lithuania, allowing Balsys to invoke the Fifth Amendment privilege will not serve to promote the principles underlying our criminal justice system.

Rather, to allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications. As stated by the court in *Lileikis*, "the United States cannot be deterred by the threat of a prosecution by a foreign sovereign from gathering evidence for its own purposes." 899 F. Supp. at 807. The government has a strong interest in determining whether or not an individual misrepresented information on his visa application. In seeking to compel Balsys's testimony, the government's primary purpose is "the vindication of the domestic laws of the United States." *Id.* at 809. Although Balsys does indeed have a real and substantial fear of prosecution by Lithuania and Israel, the laws of the United States should not be sacrificed where the government has established an independent and legitimate need for his testimony.

In declining to extend the Fifth Amendment privilege in the present case, the Court concludes that the fundamental purpose of the privilege is to protect individuals against governmental overreaching. Balsys seeks to assert the privilege as a means to thwart the enforcement of domestic law. This is contrary to the values the Fifth Amendment was intended to protect. Although Balsys may suffer harm as a result of the incriminating nature of the

disclosure, the government has a valid purpose. There is no indication that the government's motive is malicious, or that the government is engaging in "overzealous prosecution."

A contrary decision by this Court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. Accordingly, the Court concludes that Respondent is not entitled to invoke the Fifth Amendment privilege against compelled self-incrimination.

Although this holding is limited to the facts of the present case, the Court is of the opinion that the Fifth Amendment was intended to preserve a witness's individual privacy only in the context of a criminal prosecution by our state or federal government and for the sole purpose of preventing governmental overreaching. This Court therefore believes that the Fifth Amendment privilege cannot be asserted by a witness who fears prosecution under the criminal laws of a foreign sovereign.

III. Waiver of Fifth Amendment Privilege

Even if Balsys were entitled to the protection of the Fifth Amendment, the Court finds that he waived any such privilege when he first applied for immigration and answered questions posed to him by government officials.

Voluntary statements on a given subject constitute an implied waiver of any subsequent Fifth Amendment claim related to that subject. *Rogers v. United States*, 340 U.S. 367, 371, 71 S. Ct. 438, 441, 95 L.Ed. 344 (1951); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942). Statements made in one proceeding, however, cannot constitute a waiver of the privilege at a separate proceeding. *See United States v. Housand*, 550 F.2d 818, 821 n. 3 (2d Cir.), *cert. denied*, 431 U.S. 970, 97 S. Ct. 2931, 53 L.Ed.2d 1066 (1977).

The Court finds that the present case does not involve two separate proceedings. In 1961, Balsys initiated immigration proceedings which remain open today. When he first applied for an immigrant visa in 1961, officials at the United States Consulate in Liverpool, England made inquiries into his prior record of employment and his activities during World War II. At that time Balsys voluntarily responded to such questioning, and testified under oath regarding the nature of his wartime activities in Europe and his immigration to the United States. Balsys's answers to questions about his whereabouts and activities from 1934 to 1944, whether given in 1961 or today, are part of the same proceeding. Therefore, this Court concludes that Balsys's representations to immigration authorities constituted a waiver of any Fifth Amendment privilege which he now claims in response to questions posed by the OSI concerning his procurement of a United States immigrant visa.

IV. Production of Documents

Balsys has also invoked the Fifth Amendment privilege in refusing to produce the documents described in the subpoena. Although the privilege generally does not apply to requests to produce documents, the

very act of producing the documents may have "communicative aspects which rise to the level of a testimonial communication, as where merely acknowledging possession of the documents would be an incriminating admission." *Matter of Grand Jury (Markowitz)*, 603 F.2d 469, 477 (3d Cir. 1979). *See also United States v. Doe*, 465 U.S. 605, 612, 104 S. Ct. 1237, 1242, 79 L.Ed.2d 552 (1984) (noting that act of production may be testimonial). Balsys has made no showing, however, that the production of such documents would be testimonial in nature. *See Matter of Grand Jury (Markowitz)*, 603 F.2d at 476 ("A witness who produces preexisting documents pursuant to subpoena does not testify as to all facts which the documents themselves may reveal.").

CONCLUSION

For the reasons stated above, the government's motion for an order compelling compliance with its administrative subpoena is hereby GRANTED with respect to both the deposition questions the OSI wishes to ask of the Respondent and the documents described in the subpoena.

SO ORDERED.

No. 97-873

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALOYZAS BALSYS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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There is no need to grant certiorari in this case since it was correctly decided. Certiorari should be granted in *Vytautas Gecas v. United States of America* which was placed on this Court's docket on November 26, 1997 as No. 97-884. The facts in these cases are substantially similar. In *Gecas* the United States Court of Appeals for the Eleventh Circuit concluded that the Fifth Amendment privilege against self-incrimination can not be invoked for fear of foreign criminal prosecution. The results in these cases are diametrically opposed and the *Gecas* case merits the review.

Respectfully submitted,

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No. 97-873

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: NOVEMBER 24, 1997
CERTIORARI GRANTED: JANUARY 16, 1998

TABLE OF CONTENTS

NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for a writ of certiorari:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 93 Misc. 227(SJ)

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

DOCKET ENTRIES

11/16/93	1	MOTION by United States To Enforce Administrative Subpoena (dg) [Entry date 11/19/93]
11/16/93	2	MEMORANDUM by United States in support of [1-1] motion To Enforce Administrative Subpoena (dg) [Entry date 11/19/93]
12/10/93	3	Letter dtd 12/9/93 from Robert Seasonwein to Judge Johnson enclosing a copy of the transcript of Aloyzas Balsy's [*sic*] sworn statement taken on 11/16/93. (Copy attached). (sy) [Entry date 12/23/93]

1/7/94	4	ANSWER to Petition by Aloyzas Balsys. (sy) [Entry date 01/11/94]
1/7/94	5	MEMORANDUM by Aloyzas Balsys in opposition to [1-1] govt's motion To Enforce Administrative Subpoena. (sy) [Entry date 01/11/94]
1/7/94	6	APPENDIX 1-24 filed by Aloyzas Balsys. (sy) [Entry date 01/11/94]
2/8/94	8	Ivars Berzins' SUPPLEMENTAL AFFIDAVIT regarding newly discovered evidence that supports the respondent's claimed fear of foreign prosecution. (sy)
2/17/94	9	REPLY MEMORANDUM OF LAW by United States to Respondent's Supplemental Affidavit regarding [1-1] motion to Enforce Administrative Subpoena. (sy) [Entry date 02/24/94]
2/25/94	10	Letter dtd 2/22/94 from Ivars Berzins to Robert Seasonwein requesting a clarification of the Law of the Republic of Lithuania Concerning Responsibility For Genocide of The People of Lithuania. (sy) [Entry date of 03/02/94]
3/17/94	11	Letter dtd 3/7/94 from Ivars Berzins to Judge Johnson requesting time to apply to the proper officials in Lithuania for a copy of their genocide law. (sy)

4/8/94	12	Letter from Ivars Berzins to Judge Johnson dated April 5, 1994. Enclosing a copy of an English translated version of a letter from the Procurator General of the Republic of Lithuania regarding the "Law On the Responsibility for the Genocide of the Population of Lithuania." (dj) [Entry date 04/13/94]
10/11/94	13	Letter dtd 10/5/94 from Ivars Berzins to Judge Johnson enclosing 9/28/94 letter to him from Denise Noonan Slavin and the 9/26/94 Daily Report. (Enclosed). (sy)
5/8/95	14	LETTER dated 4/20/95 from Ivars Berzins to Sterling Johnson re: enclosing copy of the Eleventh Circuit's decision in the Gecas case which is relevant to the matter. (mr)
11/2/95	15	LETTER dated 9/19/95 from Robert G. Seasonwein to Hon. Judge Johnson enclosed for your consideration is a copy of the U.S. District Court for the District of Massachusetts' recent opinion in U.S. -V- Aleksandras Lileikis, No. 94-11902-RGS (D.C. Ma. September 15, 1995). (dg)
3/13/96	16	ORDER granting [1-1] motion to Enforce Administrative Subpoena. For the reasons stated above, the govern-

ment's motion for an order compelling compliance with its administrative subpoena is hereby granted with respect to both the deposition questions the OSI wishes to ask of the respondent and the documents described in the subpoena. (signed by Judge Sterling Johnson Jr. on 3/5/96) c/m (dg)

5/10/96 17 NOTICE OF APPEAL by Aloyzas Balsys. Fee Paid $ 105.00 Receipt # 183174. Notice of Appeal and certified copy of docket sent appealing [16-1] order. Service made by clerk. (mm) [Entry date 05/20/96]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6144

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

DOCKET ENTRIES

5/23/96 Copy of district court docket entries and notice of appeal on behalf of Appellant Aloyzas Balsys filed. [96-6144] Form C due on 5/20/96. Form D due on 5/20/96. (ag42)

5/23/96 Appellant Aloyzas Balsys Form C filed, with proof of service. [96-6144] Form C deadline satisfied. (ag42)

5/23/96 Appellant Aloyzas Balsys Form D filed, with proof of service. [96-6144] Form D deadline satisfied. (ag42)

5/31/96 Scheduling order #1 filed. Record on appeal due on 6/24/96. Appellant's brief and appendix due on 7/1/96. Appellee's brief due on 7/31/96. Argument as early as week of 8/26/96. (Pre-Argu-

ment Conference scheduled for 6/14/96 @10:45). [Per SAB] (ag42)

6/3/96 Appellee United States of America motion to dismiss the appeal FILED (w/pfs). [808665-1] [Forwarded to AA] (ag42)

6/3/96 Appellee United States of America Memorandum Of Law SUPPORTING motion to dismiss appeal # [808665-1] by Appellee United States of America filed. [Forwarded to AA] (ag42)

6/10/96 Letter dated 6/5/96 submitted by Robert G. Seasonwein received. Re: Request To Withdraw Motion For Dismissal. [Forwarded to AA] (ag42)

6/14/96 Order FILED WITHDRAWING motion by Appellee United States of America —order endorsed on motion to dismiss the appeal [808665-1]—[Per BJM] (ag42)

6/18/96 Notice of counsel of order dated 6/14/96. (ag42)

6/20/96 New scheduling order number TWO filed. New record on appeal due date is 7/1/96. New appellant's brief due date is 7/8/96. New appellee's brief due date is 8/12/96. New argument week as early as 9/3/96. [Per SAB] (ag42)

6/21/96 Notice of appearance form on behalf of Robert G. Seasonwein, Esq., received. (Orig. to Calendar) (in04)

6/25/96 Record on appeal index in lieu of record filed. (ag42)

6/27/96 Letter dated 6/25/96 submitted by Robert G. Seasonwein received. Re: Copy of Government's Reply Listed on DC Docket Sheet. (ag42)

7/8/96 Appellant Aloyzas Balsys brief FILED with proof of service. (ag42)

7/8/96 Appellant Aloyzas Balsys joint appendix filed w/pfs. Number of volumes: One. (ag42)

8/12/96 Appellee United States of America brief filed with proof of service. [SERVICE EFFECTED BY MAIL ON 8/9/96] (ag42)

8/26/96 Appellant Aloyzas Balsys reply brief filed with proof of service. (ag42)

9/6/96 Proposed for argument the week of 10/21/96 PM PANEL. (ca93)

9/19/96 Set for argument on 10/21/96 PM. [96-6144] (ca93)

10/21/96	Case heard before MESKILL, CALABRESI C.JJ., BLOCK, D.J. (TAPE: #14+15) (ca95)
7/15/97	The district court's order compelling compliance with the government's administrative subpoena is VACATED and REMANDED for proceedings consistent with this opinion; by published signed opinion filed. (Per GC) [96-6144] (ag42)
7/15/97	Judge Block, District Judge, with whom Judge Calabresi joins, concuring in a separate opinion filed. (ag42)
7/15/97	Judge Meskill concurring in the result in a separate opinion filed. (ag42)
7/15/97	Judgment filed. (ag42)
7/23/97	Note: The OPINION PRICE is $ 9.00 (rek)
8/28/97	Appellee USA Petition for Rehearing and Suggestion for Rehearing In Banc, FILED, [1036172-2] with proof of service filed. (ag41)
9/19/97	Mandate receipt returned from the district court. (reh)
9/19/97	Letter sent to district court recalling mandate. (ag40)

9/25/97	Order FILED DENYING petition for REHEARING [1036172-1] and DENYING petition for rehearing in banc [1036172-2] by Appellee USA, endorsed on motion dated 8/28/97. (BJM) (ag41)
9/25/97	Order FILED DENYING petition for REHEARING [1036172-1] AND DENYING petition for REHEARING IN BANC [1036172-2] by Appellee USA. (ag41)
10/6/97	Judgment MANDATE ISSUED. (ag41)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No.

UNITED STATES OF AMERICA, PETITIONER,

v.

ALOYZAS BALSYS, RESPONDENT

PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA

The United States of America, by the undersigned, avers to this Court as follows:

1. This is a proceeding brought pursuant to Section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1225(a), as amended (hereinafter, "the Act"), to judicially enforce an administrative subpoena.

2. The petitioner is the United States of America.

3. The respondent, Aloyzas Balsys is an alien presently residing at 86-34 91st Street, Woodhaven, New York 11421, within the jurisdiction of this Court. His alien registration number is A12 328 781. Respondent is not a United States citizen.

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1345.

5. Venue is proper pursuant to 8 U.S.C. § 1225(a).

6. The Office of Special Investigations (hereinafter "OSI") was created by the Attorney General pursuant to Order No. 851-79, September 4, 1979, and is, *inter*

alia empowered to investigate the activities of individuals "who prior to and during World War II, under the supervision of or in association with the Nazi government of Germany, its allies or other affiliated governments, are alleged to have ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion." Attached hereto as Exhibit A is a copy of that Order. On the same date, the Attorney General issued Order No. 852-79, codified at 28 C.F.R. § 0.55(f). This Order amended the functions of the Criminal Division of the Department of Justice to include:

> All litigation arising under the immigration and nationality laws . . . and the passport and visa laws . . . and investigations and other appropriate inquires pursuant to all the power and authority of the Attorney General to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens as they relate to the individuals identified in 8 U.S.C. 1182(a)(33) and 1251(a)(19).

(emphasis supplied).

7. Pursuant to this mandate from the Attorney General and to the authority contained in Section 1225(a) of the Act and regulations enacted thereunder, specifically 8 C.F.R. § 287.4, OSI is empowered to conduct questioning, to issue subpoenas, and to require the production of pertinent and material books, papers and documents. Moreover, OSI is empowered when necessary to take appropriate legal action to deport, denaturalize or otherwise prosecute an individual who was admitted as an alien into or became a

naturalized citizen of the United States and who assisted the Nazis as aforesaid.

8. OSI is conducting a civil investigation into the immigration of Aloyzas Balsys to the United States as set forth in the Declaration of Robert G. Seasonwein attached hereto as Exhibit B.

9. The respondent, Aloyzas Balsys, is in possession and control of information and documents relevant to the above-described investigation.

10. On October 8, 1993, a subpoena was issued by Neal M. Sher, Director, Office of Special Investigations, directing the respondent, Aloyzas Balsys, to appear before OSI attorney Robert G. Seasonwein, on October 22, 1993, at 10:00 a.m. at the office of the United States Attorney, 1 Pierpont Plaza, Brooklyn, New York 11201 to testify and to produce for examination documents described in the subpoena (Exhibit C). This subpoena was personally served upon respondent on October 14, 1993, by Immigration and Naturalization Service Special Agent Frank J. Cirigione, as evidenced on the Return portion of Exhibit C.

11. At the request of respondent's counsel, the subpoena was continued until November 16, 1993 at 10:00 a.m. in Brooklyn, New York. At that time and place, respondent, accompanied by counsel, appeared and was placed under oath, but failed to testify as to any matters other than his name and address, asserting a privilege under the Fifth Amendment to the Constitution for each and every question posed. Further, while respondent did produce his Alien Registration Card for inspection, he asserted a Fifth Amendment privilege as to the production of any other documents. Neither respondent nor his counsel

would specify the bases for those alleged constitutional privileges.

12. The documents, testimony and other data sought by the subpoena are not already in possession of OSI.

13. All administrative steps required for the issuance of a subpoena have been taken.

14. The subpoena is reasonable in scope and adequately describes the documents to be produced.

15. The testimony and documents sought by the subpoena are relevant and necessary to the OSI's investigation.

16. It is necessary to obtain the testimony and examine the documents and other data sought by the subpoena in order to properly investigate the immigration of Aloyzas Balsys to the United States, as is stated in the Declaration of OSI attorney Robert G. Seasonwein, attached hereto and incorporated herein as part of this petition.

WHEREFORE, the petitioner respectfully prays:

1. That the Court enter an Order directing the respondent, Aloyzas Balsys, to comply with and obey the aforementioned subpoena and each and every requirement thereof by ordering the attendance, testimony, and production of the documents, and other data as is required and called for by the terms of the subpoena before Robert G. Seasonwein or any other proper officer or employee of OSI, at such time and place as may be fixed by Neal M. Sher or any other proper officer or employee of OSI.

2. That the Court order respondent to pay the costs of the United States in maintaining this action.

3. That the Court grant such other and further relief as is just and proper.

DATED: November 16, 1993.

Respectfully submitted,

ZACHARY W. CARTER
United States Attorney
Eastern District of New York

NEAL M. SHER
Director

RONNIE L. EDELMAN
Deputy Director

/s/ ROBERT G. SEASONWEIN
ROBERT G. SEASONWEIN
Senior Trial Attorney
Office of Special Investigations
Criminal Division
1001 G Street, N.W.,
Suite 1000
Washington, D.C. 20530
(202) 616-2492

[agency seal omitted]

Office of the Attorney General
Washington, D.C. 20530

TRANSFER OF FUNCTIONS OF THE SPECIAL LITIGATION UNIT WITHIN THE IMMIGRATION AND NATURALIZATION SERVICE OF THE DEPARTMENT OF JUSTICE TO THE CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

Order No. 851-79

It is the objective of this transfer to consolidate into a single unit within the Criminal Division all the Department's investigative and litigation activities involving individuals, who prior to and during World War II, under the supervision of or in association with the Nazi government of Germany, its allies, and other affiliated governments, are alleged to have ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion.

This order assigns to the Criminal Division within the Department of Justice the primary responsibility for detecting, investigating, and, where appropriate, taking legal action to deport, denaturalize, or prosecute any individual who was admitted as an alien into or became a naturalized citizen of the United States and who had assisted the Nazis by persecuting any person because of race, religion, national origin, or political opinion.

This Order establishes within the Criminal Division an Office of Special Investigations to carry out

the functions described in this Order. Without divesting the Attorney General of any of his powers, privileges, or duties under the immigration and naturalization laws, and except as to the Board of Immigration Appeals, there is delegated to the Assistant Attorney General, Criminal Division, his Deputies, and the Director, Office of Special Investigations, Criminal Division, the authority of the Attorney General to direct the administration of the Office of Special Investigations and to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens as they relate to individuals who allegedly, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with:

1. The Nazi government of Germany,

2. Any government in any area occupied by the military forces of the Nazi government of Germany,

3. Any government established with the assistance or cooperation of the Nazi government of Germany, or

4. Any government which was an ally of the Nazi government of Germany, ordered, incited, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

The Office of Special Investigations shall:

1. Review pending and new allegations that individuals, who prior to and during World War II, under the supervision or in association with the Nazi government of Germany, its allies, and other affiliated governments, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin or political opinion;

2. Investigate, as appropriate, each allegation to determine whether there is sufficient evidence to file a complaint to revoke citizenship, support a show cause order to deport, or seek an indictment or any other judicial process against any such individuals;

3. Maintain liaison with foreign prosecution, investigation and intelligence offices;

4. Use appropriate Government agency resources and personnel for investigations, guidance, information, and analysis; and

5. Direct and coordinate the investigation, prosecution, and any other legal actions instituted in these cases with the Immigration and Naturalization Service, the Federal Bureau of Investigation, the United States Attorneys Offices, and other relevant Federal agencies.

Date: September 4, 1979

/s/ BENJAMIN R. CIVILETTI
BENJAMIN R. CIVILETTI
Attorney General

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No.

UNITED STATES OF AMERICA, PETITIONER,

v.

ALOYZAS BALSYS, RESPONDENT

DECLARATION

Robert G. Seasonwein, being duly sworn, declares as follows:

1) I am a senior trial attorney in the Office of Special Investigations (OSI), Criminal Division, United States Department of Justice, Washington, D.C., duly appointed according to law and acting as such.

2) I am the attorney acting as counsel for the Government in the investigation of the wartime activities and immigration to the United States of Aloyzas Balsys.

3) Respondent was born on February 6, 1913 in Ansieniai, Plateliai Province, Lithuania and entered the United States on June 30, 1961 pursuant to section 221 of the Immigration and Naturalization Act (the "Act").

4) On May 2, 1961, in connection with his application to enter the United States under the Act, respondent swore that the information contained in his application for Immigrant Visa and Alien Registration was true. During this application process, respondent misrepresented his wartime activities.

5) On May 2, 1961, based on respondent's statements given during the screening and admission process, he was issued the Immigrant Visa under which he entered the United States.

6) OSI has information and evidence that during World War II, respondent assisted the Nazi forces and participated in the persecution of persons because of their race, religion and/or political opinion, which conduct rendered him ineligible for a visa under the Act.

7) In furtherance of the above investigation and in accordance with 8 U.S.C. §1225(a), a subpoena was issued on October 8, 1993, to Aloyzas Balsys to give testimony and to produce documents on October 22, 1993, as described in said subpoena.

8) On October 14, 1993, respondent was personally served with the above described subpoena by Immigration and Naturalization Service Special Agent Frank J. Ciringione, as evidenced by the Return on the bottom portion of the subpoena.

9) On October 21, 1993, at the request of Ivars Berzins, respondent's attorney, the deposition was rescheduled for November 16, 1993.

10) On November 16, 1993, respondent appeared pursuant to the above described administrative subpoena in Brooklyn, New York. Respondent was put under oath and asked questions in English which were then translated into Lithuanian, his native tongue. Respondent testified as to his name and address, but refused to testify in response to all other questions, and, with the exception of producing his Immigrant Registration card for inspection, refused to testify about or produce documents pursuant to

subpoena, asserting alleged constitutional privileges under the Fifth Amendment to the United States Constitution.

11) Despite repeated inquiry and request, neither respondent nor his counsel would state any basis or authority for the alleged constitutional privilege asserted.

12) The documents, testimony and other data sought by the subpoena are not already in possession of OSI.

13) All administrative steps required for the issuance of a subpoena have been taken.

14) It is necessary to obtain the testimony and to examine the documents, and other data sought by the subpoena in order to properly investigate the immigration of Aloyzas Balsys to the United States.

DECLARATION IN LIEU OF JURAT
(28 U.S.C. 1746)

I declare under penalty of perjury that the following is true and correct. Executed on this sixteenth day of November 1993.

/s/ ROBERT G. SEASONWEIN
ROBERT G. SEASONWEIN
Senior Trial Attorney
Office of Special Investigations
Criminal Division
1001 G Street, N.W.,
Suite 1000
Washington, D.C. 20530
(202) 616-2492

United States of America
Department of Justice
Criminal Division
Office of Special Investigations

Subpoena

Mr. Aloyzas Balsys
TO: 86-34 91st Street Date: October 8, 1993
Woodhaven, New York
11421

You are hereby commanded to appear before Robert G. Seasonwein, a representative of the United States Department of Justice, Criminal Division, Office of Special Investigations, in the United States Attorney's Office 1 Pierpont Plaza, 11th Floor, Brooklyn, New York 11201.

on the 22nd day of October 1993, at 10:00 o'clock A.M. to give testimony in connection with the investigation of Aloyzas Balsys being conducted under authority of the Immigration and Nationality Act, relating to your residence and activities in Europe (including but not limited to the years 1940-1945), and your subsequent immigration to the United States.

You are further commanded to bring with you the following documents: All documents and photographs (whether originals or copies) in your possession or under your control which concern your date and place of birth, your whereabouts and activities in Europe (including but not limited to 1940-1943), your immi-

gration to and residence in the United States. Notify this office if an interpreter will be needed to assist you in giving testimony and, if so, what foreign language the testimony will be given in.

/s/ NEAL M. SHER
NEAL M. SHER, Director
Office of Special
Investigations
Criminal Division
(202) 616-2492

RETURN

I hereby certify that on the 14th day of October, 1993,

I served the above subpoena on the witness named above by

/s/ FRANK J. CIRINGIONE
FRANK J. CIRINGIONE
(Name)

Special Agent
(Title)

Received by /s/ A. BALSYS
A. BALSYS

DEPARTMENT OF STATE
FOREIGN SERVICE OF THE UNITED STATES OF AMERICA

Form Approved.
Budget Bureau No. 47-R150.2.

APPLICATION FOR IMMIGRANT VISA AND ALIEN REGISTRATION

INSTRUCTIONS: This form must be filled out in DUPLICATE by typewriter, or if by hand in legible block letters. ALL questions must be answered, if applicable. Questions which are not applicable should be so marked. If there is insufficient room on the form, answer on separate sheets, in duplicate using the same numbers as appear on the form. Attach the sheets to the forms. DO NOT SIGN this form until instructed to do so by the consular officer. The fee for filing this application for an immigrant visa if $5.00. The fee should be paid in United States dollars or local currency equivalent or by bank draft, when you appear before the consular officer.

WARNING: Any false statement or concealment of a material fact may result in your permanent exclusion from the United States. Even though you should be admitted to the United States, a fraudulent entry could be ground for your prosecution and/or deportation.

I hereby apply for an immigrant visa and alien registration at the United States CONSULATE at Liverpool, England and state the following facts:

1. My family name is: B A L S Y S
My first name is: Aloyzas
My middle name is:

2. My full name in native alphabet (*If other than Roman letters are used*) is: "not aplicable"

3. Other names I have used or by which I have been known are (*If married woman, give maiden name*): "none"

4. The date of my birth is (*Day*) 6. (*Month*) 2. (*Year*) 1913

5. My place of birth is (*City or town*) LITHUANIA (*Province*) Plateliai (*Country*) Ansieniai (village)

6. My age is: 48

7. My present calling or occupation is: Textile Supervisor (Overlooker)

8. My present address is: 33, Milton Street, Halifax, Yorks ENGLAND

9. My sex is: Male
☐ Male ☐ Female

10. My marital status is: Married
☐ Single (*never married*) ☐ Married ☐ Widowed ☐ Divorced ☐ Separated
Including my present marriage, I have been married one times.

11. My nationality is ~~Lithuanian~~ STATELESS

12. My race is: white

13. My ethnic classification is: Lithuanian

14. My personal description is:
(a) Color of hair: dark
(b) Color of eyes: blue
(c) Height: 5 ft., 9 ins (feet / inches)
(d) Complexion: normal

15. I have the following visible marks of identification: "none"

16. My purpose in going to the United States is: to settle down there permanently

17. I intend to remain in the United States permanently or (*Give length of time*) Permanently

18. I intend to enter the United States at the port of: New York

19. I (Do) (Do Not) have a ticket to my final destination: I do not have a ticket to my final destination

20. (a) I am going to the United States to join the following person (*Give name and address and relationship, if any*)
Mr. Antanas J. M A Č I O N I S (FRIEND)
8603 76th St. Woodhaven 21, N.Y.

20. (b) I am sponsored by the following person and/or organization (*Give address if different from* (a))
UNITED LITHUANIAN RELIEF FUND OF AMERICA, INC. 105 Grand St. Brooklyn 11, N.Y.

21. My final address in the United States is: as in part 20 (a)

22. My personal financial resources are
(a) Cash about 3200 dollars including
(b) Bank deposits: bank deposits
(c) Real estate (*value*): "None"
(d) Other: "none"

THIS FORM MAY BE OBTAINED GRATIS AT CONSULAR OFFICES OF THE UNITED STATES OF AMERICA

Form FS-510 (English) (8-17-59) Page 2

23. I am submitting the following personal documents in support of and as part of my application

- [x] Birth certificate
- [ ] Police certificate(s)
- [ ] Other (*describe*)
- [ ] Military record
- [x] Evidence of support ~~or~~ and own resources
- [ ] Promise of employment
- [ ] Medical record(s)

24. Name and present residence of my wife/husband is (*Give maiden name of wife*)

J U O Z A P A V I Č I U T Ė Regina
33, Milton St., Halifax, Yorks, ENGLAND

25. The names and addresses of my children under 21 years of age are

B A L S Y S Algimantas
B A L S Y S Jūratė 33, Milton St., Halifax, Yorks, England

26. The names of members of my family who are immigrating with me are

"~~None~~"
WIFE - ls N°24.
SON - ALGIMANTAS
DAUGHTER. JURATE

27. The name and address of my father is (*If deceased, so state, giving date*)

ANTANAS BALSYS Deceased in 1944

28. The maiden name and address of my mother is (*If deceased, so state, giving date*)

DOMICELE GRISMANAUSKAITE Deceased in 1954

29. The name and address of my next of kin in my home country is Balsys Justinjonas (bother) and Dobravalskienė Zosė (sister), at Plateliai, LITHUANIA

30. Since my sixteenth birthday my places of residence for 6 months or more have been

City or town / Province / Country	Dates (From—To)	Calling or occupation
Farm 7, Ansieniai, Plateliai, Lithuania	6.2.1913-1.10.1934	Scholar & farmer
~~Lith. Army at Radviliškis-Kaunas & Vilnius~~	~~1934-23.11.1940~~	Sergant-major Insbructor
~~Farm 7, Ansieniai, Plateliai, Lith.~~	~~1940- 9.10.1944~~	in hiding from N.K.V.D. and as aChairman of Municipality
FLENSBURG GERMANY DP CAMP	JAN 1945 - 7.27.1947.	
~~On the run to Germany and to England~~ IN 1947 and [illegible]		
HALIFAX YORKSHIRE ENGLAND	7.27.1947 - TO DATE	

31. Since my sixteenth birthday I am or have been a member or affiliate of the following political, professional, vocational or social organizations

Name and address	Dates (From—To)	Type of membership and office held, if any
TEXTILE INSTITUTE, MANCHESTER.	1955 - TO DATE	ORDIN ARY.

Before I came to England I never belonged to any organisation

Since 1947 I belong to Lithuanian Association in Great Britain (social)

32. I speak, read, write the following languages (*Include your native language*)

Language	Speak	Read	Write
Lithuanian	Speak	Read	Write
~~English~~	~~Speak~~	~~Read~~	~~Write~~
Polish	Speak	Read	No
German	Speak	Read	No

33. I have previously been in the United States during the following periods (*Give year and type of visa or status*) (*If never, so state*)

"Never"

14. United States immigration laws require that all prospective immigrants answer the following questions. This requirement does not imply that you are suspected of being within any of the classes described in these questions. Your answers will assist the consular officer to establish your eligibility to receive a visa. If you are unable to answer any of these questions please explain your inability fully on a separate sheet of paper which you should attach to this form. Please bear in mind that whatever the nature of your answers to these questions, you are not necessarily ineligible to receive a visa. For example, if you were arrested and/or convicted for a minor offense, and the consular officer is able to establish that such offense was in fact a misdemeanor, your arrest and/or conviction would not necessarily make you ineligible for a visa.

Give the correct answer to the following questions by circling "Yes" or "No"

(1) (a) Have you ever been arrested for, charged with, indicted for, or convicted of, a crime or other offense?	Yes	(No)
(b) Have you ever been confined in a civilian prison or jail?	Yes	(No)
(c) Have you ever been confined in a military prison or jail?	Yes	(No)
(d) Have you ever been engaged in illicit buying, selling or handling of narcotic drugs?	Yes	(No)
(e) Have you ever been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action? *(If so, explain)*	Yes	(No)
(2) (a) Have you ever been placed in an almshouse (*poorhouse or charitable institution*)?	Yes	(No)
(b) Are you a pauper, professional beggar or vagrant?	Yes	(No)
(c) Are you now afflicted with a physical defect, disease or disability which may affect your ability to earn a living?	Yes	(No)
(d) Will you be able to support yourself financially in the United States?	(Yes)	No
(3) (a) Have you ever had one or more attacks of insanity?	Yes	(No)
(b) Are you now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?	Yes	(No)
(c) Are you now or have you ever been a narcotic or drug addict or chronic alcoholic?	Yes	(No)
(d) Have you ever been treated in a hospital, institution or elsewhere for insanity or other mental disorder or for drug or narcotic addiction or alcholism?	Yes	(No)
(e) Have you ever had any of the following:		
(A) Tuberculosis in any form?	Yes	(No)
(B) Leprosy?	Yes	(No)
(C) Any other dangerous contagious disease?	Yes	(No)
(4) (a) Are you a polygamist, do you practice polygamy, or do you advocate the practice of polygamy?	Yes	(No)
(b) Are you or have you ever been a prostitute, procurer, or supported wholly or in part from the proceeds of prostitution?	Yes	(No)
(c) Are you going to the United States to engage in an immoral sexual act, in prostitution, or other unlawful commercialized vice?	Yes	(No)
(5) (a) Have you previously applied for a visa to enter the United States either as an immigrant or as a nonimmigrant? *(If answer is Yes, state where and when, whether you applied for a nonimmigrant or an immigrant visa and whether the visa was issued)*	Yes	(No)
(b) Have you been refused admission to the United States during the last twelve months? *(If the answer is Yes submit evidence that the Attorney General has consented to your reapplying for admission into the United States)*	Yes	(No)
(c) Have you ever been		
(A) arrested and deported from the United States?	Yes	(No)
(B) voluntarily removed from the United States at United States Government expense as a person who fell into distress?	Yes	(No)
(C) removed from the United States as an alien enemy?	Yes	(No)
(D) removed from the United States at Government expense in lieu of deportation?	Yes	(No)
(If the answer to any of the above questions is Yes, submit evidence that the Attorney General has consented to your reapplying for admission into the United States.)		
(6) (a) Have you ever attempted to obtain by fraud or willful misrepresentation a visa or other documentation to enter the United States?	Yes	(No)
(b) Have you ever obtained by fraud or willful misrepresentation a visa or other documentation to enter the United States?	Yes	(No)
(7) (a) Are you now or have you ever been ineligible for United States citizenship?	Yes	(No)
(b) Have you ever departed from or remained outside of the United States to avoid or evade military service in time of war or national emergency?	Yes	(No)
(c) Have you ever registered with a draft board under the selective service laws of the United States?	Yes	(No)
(8) Can you, if you are over sixteen, read and understand some language or dialect?	(Yes)	No
(9) Have you for gain ever assisted another alien to enter the United States or try to enter the United States in violation of the laws of the United States?	Yes	(No)
(10) Are you a former exchange visitor who has not resided abroad for two years following your departure from the United States?	Yes	(No)
(11) Are you now or have you ever been		
(a) an anarchist?	Yes	(No)
(b) an advocate of opposition to all organized government?	Yes	(No)
(c) an advocate of Communism?	Yes	(No)
(d) a member of, or affiliated with, the Communist Party or affiliated organization, an organization advocating Communism or a Communist-dominated or controlled organization or an organization advocating the overthrow by force of all organized government or any other similar organization?	Yes	(No)
(If the answer to any of the above questions is Yes, explain, giving dates and nature of activities or membership.)		

34. (Continued)
(13) Do you intend to enter the United States from Canada, Mexico or an island adjacent to the United States within two years after arrival in such country or island? *(If answer is Yes, give the name of transportation company by which you entered or intend to enter such country or island)* — Yes: No (circled)

35. Were you assisted in completing this application? *(If so, give name and address of person or persons assisting you indicating whether relative, friend, attorney, travel agent, or other)*

Name *Address*

"no one"

DO NOT WRITE BELOW THE FOLLOWING LINE
The consular officer will assist you in answering the following parts 36 and 37

36. I claim to be exempt from ineligibility to receive a visa and exclusion under item ..... in part 34 for the following reason:

37. I claim to be a

☒ NON preference quota immigrant under the LITHUANIAN quota.

☐ Nonquota immigrant.

My claim is based on the following facts:

I understand that I am required to surrender my visa to the United States Immigration Officer at the place where I apply to enter the United States, and that the possession of a visa does not entitle me to enter the United States if at that time I am found to be inadmissible under the immigration laws.

I understand that any willfully false or misleading statement or willful concealment of a material fact made by me herein may subject me to permanent exclusion from the United States and, if I am admitted to the United States, may subject me to criminal prosecution and/or deportation.

I, the undersigned applicant for a United States immigrant visa, do solemnly swear (or affirm) that all statements which appear in this application have been made by me, including the encircling of items in part 34, and are true and complete to the best of my knowledge and belief. I do further swear (or affirm) that, if admitted into the United States, I will not engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activities subversive to the national security; in any activity a purpose of which is the opposition to, or the control, or overthrow of, the Government of the United States, by force, violence, or other unconstitutional means; or join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under Section 7 of the Subversive Activities Control Act of 1950. I understand all the foregoing statements, having asked for and obtained an explanation on every point which was not clear to me.

..... (Signature of Applicant)

Subscribed and sworn to before me this ..... day of MAY - 2 1961, 19.....

SERVICE NO. 2237
TARIFF ITEM NO. 35

..... (Consular Officer)

26

[seal omitted]

U.S. Department of Justice
Criminal Division

Washington, D.C. 20530

December 9, 1993

Honorable Sterling Johnson, Jr.
United States District Judge
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Chambers Room S-162
Brooklyn, New York 11201

Re: *United States v. Balsys*, Misc. 93 227(SJ)

Dear Judge Johnson:

Enclosed is a courtesy copy of the transcript of Aloyzas Balsys' sworn statement, taken on November 16, 1993.

Very truly yours,

/s/ ROBERT G. SEASONWEIN
ROBERT G. SEASONWEIN
Senior Trial Attorney
Office of Special Investigations
Criminal Division
1001 G Street, N.W.,
Suite 1000
Washington, D.C. 20530
(202) 616-2492

cc: Ivars Berzins, Esquire
Deborah Zwamy, AUSA, Eastern District of N.Y.

[seal omitted] U.S. Department of Justice

Washington, D.C. 20530

December 1, 1993

Mr. Sheldon Silverman, Certified Shorthand Reporter

Re: *Sworn Interview of Aloyzas Balsys (November 16, 1993)*

Dear Mr. Silverman:

The attached page contains corrections of typographical or spelling errors found in the transcript of the referenced sworn interview. Would you please either incorporate those changes into the transcript, or attach the page to the transcript as an errata sheet.

Thank you for your assistance.

Sincerely yours,

/s/ _____

ROBERT G. SEASONWEIN
Senior Trial Attorney
Office of Special Investigations
Criminal Division
1001 G Street, N.W.,
Suite 1000
Washington, D.C. 20530
(202) 616-2492

U.S. V. ALOYZAS BALSYS, MISC. NO. 93-227

SWORN STATEMENT TAKEN ON
NOVEMBER 16, 1993

IN BROOKLYN, NEW YORK

ERRATA SHEET

Page	Line	Correction
4	23	Change "known" to "no"
4	24	Insert after "are", "pending or"
8	20	Change "Villiaus" to "Vilnius"
8	23	Change "is" to "was"
8	23	Change "Villiaus" to "Vilnius"
9	9	Change "Saugjumas" to "Saugumas"
9	17	Change "Villiaus" to "Vilnius"
10	2	Change "Villiaus" to "Vilnius"
10	10	Change "Lukiskiu" to "Lukiskis"
10	14	Change "Villiaus" to "Vilnius"
11	5	Change "Wohltatigskeitsgasse" to "Wohltätigkeitsgasse"
11	18	Change "Villiaus" to "Vilnius"

THE UNITED STATES
DEPARTMENT OF JUSTICE
CRIMINAL DIVISION

RE: SWORN STATEMENT OF ALOYZAS BALSYS

DEPOSITION OF:	ALOYZAS BALSYS
TAKEN AT THE INSTANCE OF:	U.S. Department of Justice
DATE:	November 16, 1993
TIME:	Commenced at 11:30 a.m. Concluded at 11:45 a.m.
LOCATION:	1 Pierrepont [*sic*] Plaza Brooklyn, N.Y. 11201
REPORTED BY:	SHELDON SILVERMAN, CSR, CM Notary Public in and for the State of New York
INTERPRETER:	Ada Ustjanauskas

Proceedings recorded by mechanical stenography, transcript produced by CAT. [000056]

[000057]

ALOYZAS BALSYS,

having been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SEASONWEIN:

Q Good morning, my name is Robert Seasonwein. I'm an attorney with the United States Department of Justice.

As is happening now, so that you can better understand any questions that I might ask you, I've asked that an interpreter, Ms. Ustjanauskas be available to interpret my questions into Lithuanian and your answers from Lithuanian into English.

Do you understand what Ms. Ustjanauskas said to you, sir?

A Yes.

Q Thank you.

I've asked you to come here this morning so I can ask you some questions about your activities in Europe prior to and during World War II and your immigration to the United States.

MR. BERZINS: Don't answer that, please.

Q My questions and your answers are being transcribed by the court reporter sitting to your left. The court reporter can only transcribe the spoken word. If I ask you a question, I would appreciate it if you would answer verbally and not by shrugging your shoulders or gesturing with your hands.

MR. SEASONWEIN: I would like to have marked as Exhibit 1 and I would like to show you a copy of the subpoena that was issued to you and served upon you.

MR. BERZINS: We will stipulate the subpoena is received.

MR. SEASONWEIN: Is that an accurate copy?

MR. BERZINS: What difference does it make? We're here.

MR. SEASONWEIN: Thank you.

I would also like to note the subpoena initially was returnable on October 22nd, 1993 but was continued in order to accommodate your counsel's schedule.

I would like to mark as Exhibits 2 and 3 a copy of Mr. Berzins' October 22nd letter and my October 26th letter back to him rescheduling the deposition.

(So marked).

Q At any time during this statement, if I ask you a question that you do not understand, please let me know and I will try to clarify it for you.

[000059]

MR. SEASONWEIN: For the record, also, I would like to note Mr. Balsys is represented by Mr. Ivars Berzins, his counsel in this matter. I say good morning, to you sir.

Q Mr. Balsys, would you please state for the record your full name?

A Balsys Aloyzas.

Q What is your present address, Mr. Balsys?

A 86-34 91st Street, Woodhaven, New York, 11421.

Q How long have you lived at the address, sir?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Under what law so you believe you will incriminate yourself?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Are there any criminal actions pending against you in the United States?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q On information and belief, known criminal actions are anticipated by the United States Department of Justice against you, sir. Do you fear prosecution

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under the laws of a foreign country?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Are you employed, sir?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Do you have a valid passport from a foreign country?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Since 1945 have you traveled to Lithuania?

A I decline to answer on grounds that the answer might tend to incriminate me (English).

Q Since initially coming to this country, have you traveled overseas?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Do you collect Social Security"

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q What is the general state of your health, Mr. Balsys?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

[000061]

Q Have you ever been known by another name?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q In addition to English and Lithuanian, what other languages do you understand?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

MR. SEASONWEIN: I would like to mark as Government Exhibit 4, copies of the documents contained in this file. I would like to show you and Mr. Berzins copies of this "A" File.

MR. BERZINS: Am I going to get a copy?

MR. SEASONWEIN: You may keep that. The other documents have not been copied. The only things that are marked as part of that exhibit, Mr. Berzins, are the application for immigrant visa. The other documents aren't germane.

(So marked.)

Q I direct your attention to the visa. Is that your photograph on the front of the visa, Mr. Balsys?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q On the photo, Mr. Balsys, is that your signature?

[000062]

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Mr. Balsys, did you arrive in New York for the first time on June 30th, 1961?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Mr. Balsys, at the time that you applied for this visa, did you tell the American consul in Liverpool, England that you are stateless?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q On the application for immigrant visa and alien registration, did you state that you had served in the Lithuanian army from 1934 until November 23rd, 1940?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q On that application, did you tell the American consul in Liverpool, England that between 1940 and October 9th, 1944 you were in hiding from the NKVD and also the chairman of the Plateliai municipality?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q What did you do between October 9th, 1944 and January 19th, '45, Mr. Balsys?

[000063]

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Where were you when the Soviets occupied Lithuania in June of 1940, Mr. Balsys?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Mr. Balsys, what did you do during the Soviet occupation of Lithuania?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Mr. Balsys, where were you in June of 1941 when the Germans occupied Lithuania?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q What did you do during the German occupation of Lithuania?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q When did you join the Villiaus Saugumas?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Who is the commanding officer of the Villiaus Saugumas?

A I decline to answer on the grounds that the

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answer might tend to incriminate me (English).

Q Do you remember Aleksandras Lileikis?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Do you remember Mr. Gimzauskas?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q While you served in the Saugumas, did you work in the Communist and Jews section?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Were you responsible for the arrest and imprisonment of Jews?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q While you served in the Villiaus Saugumas, did you work in the Polish section?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Were you responsible for the arrest and imprisonment of Poles?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q During the time that you served in the

[000064]

Villiaus Saugumas, did you work in the investigations section?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Did you turn prisoners over to the Special Detachment?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Did you ever send prisoners to Lukiskiu Prison?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q As a member of the Villiaus Saugumas, what did you do with personal property of Jews that you arrested and sent to prison?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q During 1941, where did you live in Lithuania?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q In 1942, where in Lithuania did you live?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q In 1943 where did you live in Lithuania?

[000066]

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q When did you move to apartment 5 at Wohltatigskeitsgasse 2 in Vilnius?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q When you lived in apartment 5 did your mother live with you and your wife in Vilnius?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Wasn't the apartment seized by the Saugumas from its rightful Jewish owners?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q At the time that you applied to immigrate to the United States, why didn't you tell the U.S. Vice Consul in Liverpool that you had served in the Villiaus Saugumas?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Were you afraid if you told the truth you would not be allowed to immigrate to the U.S.?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

[000067]

Q Weren't you afraid if you were caught telling lies you wouldn't be allowed to immigrate to the United States?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q At the time that you applied for a visa to immigrate to the United States, were all the answers and information that you provided to the Vice Consul true?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Have you brought any documents as requested in the subpoena?

MR. BERZINS: The witness will produce his alien registration card.

MR. SEASONWEIN: When we break we can make a copy of this, I would appreciate it.

MR. BERZINS: I think it's against the law to make copies of these so I don't want to be a participant in that procedure.

MR. SEASONWEIN: I'll bear the risk of that, Mr. Berzins.

Q Mr. Balsys, do you have any other documents that are responsive to the subpoena that you haven't brought with you today?

[000067]

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

Q Mr. Balsys, do you have anything else that you want to tell me today?

A I decline to answer on the grounds that the answer might tend to incriminate me (English).

MR. SEASONWEIN: Mr. Berzins, I have no further questions. If you care to ask your client any questions, feel free.

MR. BERZINS: Thank you, not today.

(Exhibit 5, a copy of alien registration card, marked in evidence.)

MR. SEASONWEIN: I would like to terminate the sworn interview.

(Time noted 11:45.)

CERTIFICATE

[000069]

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

I, SHELDON SILVERMAN a Notary Public of the State of New York, do hereby certify that the foregoing deposition of ALOYZAS BALSYS was taken before me on April 16, 1993.

The said witness was duly sworn before the commencement of her testimony. The said testimony was taken stenographically by myself and then transcribed.

The within transcript is a true record of the said sworn statement.

I am not connected by blood or marriage with any of the said parties, nor interested directly or indirectly in the matter in controversy, nor am I in the employ of any of the counsel.

Dated: New York, New York April 18, 1993.

/s/ SHELDON SILVERMAN
SHELDON SILVERMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Misc. 93/227, Johnson, J.

UNITED STATES OF AMERICA, PETITIONER

-against-

ALOYSAS BALSYS, RESPONDENT

ANSWER TO PETITION

Respondent, by his attorney Ivars Berzins, P.C., for his answer to the Petition to Enforce Administrative Subpoena dated November 16, 1993, alleges:

1. Admits paragraphs 1 through 7, 10 and 11.

2. Denies the allegations in paragraphs 9, 14, and 16.

3. Lacks knowledge and information sufficient to form a belief as to the truth of the allegations in paragraphs 8, 12, 13, and 15.

WHEREFORE, respondent respectfully seeks an order dismissing the petition on the grounds that he has properly invoked his privilege against self-incrimination.

Dated: January 6, 1994

/s/ IVARS BERZINS
IVARS BERZINS, (IB6202)

IVARS BERZINS, P.C.
Attorney for Respondent
484 West Montauk Highway
Babylon, New York 11702
516–661-3540

No. 64

NAZIS AND NAZI COLLABORATORS (PUNISHMENT) LAW, 5710-1950*

1. (a) A person who has committed one of the following offences—

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.

(b) In this section—

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

(1) killing Jews;

(2) causing serious bodily or mental harm to Jews;

(3) placing Jews in living conditions calculated to bring about their physical destruction;

* Passed by the Knesset on the (18th Av, 5710 1st August, 1950) and published in Sefer Ha-Chukkim No. 57 of the 26th Av, 5710 (9th August, 1950) p.281: the Bill and on Explanatory Note were published in Hatsaot Chol: No. 36 of the 11th Adar, 5710 (28th February, 1950.

(3) placing Jews in living conditions calculated to bring about their physical destruction;

(4) imposing measures intended to prevent births among Jews;

(5) forcibly transferring Jewish children to another national or religious group;

(6) destroying or desecrating Jewish religions or cultural assets or values;

(7) inciting to hatred of Jews;

"crime against humanity" means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian populatiun, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

2. If a person, during the period of the Nazi régime, committed in an enemy country an act by which, had he committed it in Israel territory, he would have become guilty of an offence under one of the following

sections of the Criminal Code, and he committed the act against a persecuted person as a persecuted person he shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory:

(a) section 152 (rape, sexual and unnatural offences);

(b) section 153 (rape by deception);

(c) section 157 (indecent act with force, etc.);

(d) section 188 (child stealing);

(e) section 212 (manslaughter);

(f) section 214 (murder);

(g) section 222 (attempt to murder);

(h) section 235 (acts intended to cause grievous harm or prevent arrests);

(i) section 236 (preventing escape from wreck);

(j) section 238 (grievous harm);

(k) section 240 (maliciously administering poison with intent to harm);

(l) section 256 (abducting in order to murder);

(m) section 258 (abducting in order to subject person to grievous hurt);

(n) section 288 (robbery and attempted robbery);

(o) section 293 (demanding property with menaces with intent to steal).

3. (a) A person who, during the period of the Nazi régime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy organisation is liable to imprisonment for a term not exceeding seven years.

(b) In this section, "enemy organisation" means—

(1) a body of persons which, under article 9 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of the 8th August, 1945, on the trial of the major war criminals, has been declared, by a judgment of that Tribunal, to be a criminal organization;

(2) any other body of persons which existed in an enemy country and the object or one of the objects of which was to carry out or assist in carrying out actions of an enemy administration directed against persecuted persons.

4. (a) A person who, during the period of the Nazi régime, in an enemy country and while exercising some function in a place of confinement on behalf of an enemy administration or of the person in charge of that place of confinement, committed in that place of confinement an act against a persecuted person by which, had he committed it in Israel territory, he would have become guilty of an offense under one of the following sections of the Criminal Code, shall be guilty of an offense under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory:

(1) section 100(c) (threatening violence);

(2) section 162 (procuring defilement of females by threats, fraud or administering drugs);

(3) section 241 (wounding and similar acts);

(4) section 242 (failure to supply necessaries);

(5) section 249 (common assault);

(6) section 250 (assault causing actual bodily harm);

(7) section 261 (unlawful compulsory labour);

(8) section 270 (theft).

(b) "Place of confinement", in this section, means any place in an enemy country which, by order of an enemy administration, was assigned to persecuted persons, and includes any part of such a place.

5. A person who, during the period of the Nazi régime, in an enemy country, was instrumental in delivering up a persecuted person to an enemy administration, is liable to imprisonment for a term not exceeding ten years.

6. A person who, during the period of the Nazi régime, in an enemy country, received or demanded a benefit —

(a) from a persecuted person under threat of delivering up him or another persecuted person to an enemy administration; or

(b) from a person who had given shelter to a persecuted person, under threat of delivering up him or the persecuted person sheltered by him to an enemy administration.

is liable to imprisonment for a period not exceeding seven years.

7. The provisions of the First Part of the Criminal Code shall, save as this Law otherwise provides, apply to offences under this Law.

8. Sections 16, 17, 18 and 19 of the Criminal Code shall not apply to offenses under this Law.

9. (a) A person who has committed an offence under this Law may be tried in Israel even if he has already been tried abroad, whether before an international tribunal or a tribunal of a foreign state, for the same offense.

(b) If a person is convicted in Israel of an offence under this Law after being convicted of the same act abroad, the Israel court shall, in determining the punishment take into consideration the sentence which he has served abroad.

10. If a persecuted person has done or omitted to do any act, such act or omission constituting an offense under this Law, the Court shall release him from criminal responsibility —

(a) if he did or omitted to do the act in order to save himself from the danger of immediate death threatening him and the court is satisfied that he did his best to avert the consequences of the act or omission; or

(b) if he did or omitted to do the act with intent to avert consequences more serious than those which resulted from the act or omission, and actually averted them;

however, these provisions shall not apply to an act or omission constituting an offence under section 1 or 2(f).

11. In determining the punishment of a person convicted of an offence under this Law, the court may take into account, as grounds for mitigating the punishment, the following circumstances:

(a) that the person committed the offence under conditions which, but for section 8, would have exempted him from criminal responsibility or constituted a reason for pardoning the offence, and that he did his best to reduce the gravity of the consequences of the offence;

(b) that the offence was committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence;

however, in the case of an offence under section 1, the court shall not impose on the offender a lighter punishment than imprisonment for a term of ten years.

12. (a) The rules of prescription laid down in the Fifth Chapter of the Ottoman Code of Criminal Procedure shall not apply to offences under this law.

(b) Repealed

13. The provisions of the General Amnesty Ordinance, 5709-1/m 1949[1], shall not apply to offences under this Law.

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[1] *I.R.* No. 50 of the 12th Shevat 5709 (11th February, 1949), Suppl. I. p. 173:

14. A prosecution for an offence under this Law may only be instituted by the Attorney General or his representative.

15. (a) In an action for an offence under this Law, the court may deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of the truth and the just handling of the case.

(b) Whenever the court decides to deviate, under subsection (a), from the rules of evidence, it shall place on record the reasons which prompted its decision.

16. In this Law—

"the period of the Nazi régime" means the period which began on the 3rd Shevat, 5693 (30th January, 1933) and ended on the 25th Iyar, 5705 (8th May, 1945);

"the period of the Second World War" means the period which began on the 17th Elul, 5699 (1st September, 1939) and ended on the 5th Elul, 5705 (14th August, 1945);

"the Allied Powers" means the states which signed the Declaration of the United Nations of the 1st January, 1942, or acceded to it during the period of the Second World War;

"Axis state" means a state which during the whole or part of the period of the Second World War was at war with the Allied Powers: the period which began on the day of the beginning of the state of war between a particular Axis state and the first, in time, of the Allied Powers and ended on the day of the cessation of hostilities between that state and the last, in time, of the

Allied Powers, shall be considered as the period of the war between that state and the Allied Powers;

"enemy county" means —

(a) Germany during the period of the Nazi régime;

(b) any other Axis state during the period of the war between it and the Allied Powers;

(c) any territory which, during the whole or part of the period of the Nazi regime, was *de facto* under German rule, for the time during which it was *de facto* under German rule as aforesaid;

(d) any territory which was *de facto* under the rule of any other Axis state during the whole or part of the period of the war between it and the Allied Powers, for the time during which that territory was *de facto* under the rule of that Axis state as aforesaid;

"enemy administration" means the administration which existed in an enemy country;

"persecuted person" means a person belonging to a national, racial, religious or political group which was persecuted by an enemy administration;

"the Criminal Code" means the Criminal Code Ordinance 1935:).

17. The Minister of Justice is charged with the implementation of this Law.

DAVID BEN-GURION
Prime Minister

PINCHAS ROSEN
Minister of Justice

YOSEF SPRINZAK
Chairman of the Knesset
Acting President of the State

April 5, 1994

Hon. Sterling Johnson, Jr.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States of America
v. Aloyzas Balsys
Index No. Misc. 93/227

Your Honor:

In response to my March 7, 1994 letter to the Procurator General of the Republic of Lithuania, I have received from him the enclosed letter dated March 23, 1994, and an official English language translation of the "Law On The Responsibility For The Genocide Of The Population Of Lithuania."

Please make this translation of the law part of the record in lieu of the translation that was submitted as respondent's Appendix 7.

Very truly yours,

Ivars Berzins

IB:jj
enc.
Robert G. Seasonwein, Trial Attorney
United States Department Of Justice
Office Of Special Investigations
Criminal Division
10th & Constitution Avenue, N.w.
Washington, D.C. 20530

[Official seal]

PROCURATOR'S GENERAL
OFFICE OF THE REPUBLIC
OF LITHUANIA

A.Smetonos str. 4. Vilnius 2709 LITHUANIA
Tele: 611620 Fax: 611826

23 March, 1994

Mr. Ivars Berzins, P.C.
Attorney at Law
484 West Montauk Highway
Babylon, New York II702

Dear Sir,

I am happy to fulfill your request and to send you the official translation of the law you requested from Lithuanian into English. Please find it enclosed in the letter.

Your faithfully,

/s/ ARTURAS PAULAUSKAS
ARTURAS PAULAUSKAS
Prosecutor General

LAW

ON THE RESPONSIBILITY FOR THE GENOCIDE OF THE POPULATION OF LITHUANIA

The Supreme Council of the Republic of Lithuania,

acceding to the 9 December 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 26 November 1968 Convention on the Non-Application of a Statute of Limitations to Military Crimes and Crimes against Humanity,

recognising the 8 August 1945 Statute of the International Military Tribunal of Nuremberg,

taking into consideration the fact that under the obligations of the aforementioned international agreements, national laws providing for the responsibility for the acts of genocide, crimes against humanity and peace, and for military crimes must be adopted,

stating that the policy of genocide and crimes against humanity with regard to the population of Lithuania was implemented during the periods of occupation and annexation by Nazi Germany and the USSR,

guiding itself by the principle that the extermination of people for whatever purpose is regarded as crime, which principle is universally recognised oy the international community,

passes this Law.

Article 1.

Actions aimed at total or partial physical extermination of the population belonging to a certain national, ethnic, racial, or religious group, which found expression in the murder of the members of these

groups, their cruel torture, infliction of heavy bodily injuries on them, or impairment of their mental development; in the deliberate creation of such living conditions which presuppose their total or partial physical extermination; in the forced transfer of children from such groups to other groups, or in the use of measures aimed at forced prevention of child birth in such groups (genocide),-

shall be punishable by imprisonment for the term of 5 to 15 years with the seizure of property, or by death penalty with the seizure of property.

Article 2.

The massacre or torture of unarmed civilians in Lithuania and their deportations carried out in the years of Lithuania's occupation and annexation by Nazi Germany or the USSR qualify as the crime of genocide under the standards of international law.

Article 3.

The law "On the Responsibility for the Genocide of the Population of Lithuania" is an *ex post facto* law, whereas the statute of limitations shall not apply to persons who have committed actions provided for in this Law prior to the coming into effect of this Law.

Article 4.

If death penalty is imposed on persons specified in Article 3 of this Law, the sentence shall be commuted to imprisonment for life under Article 49 of the Criminal Code of the Republic of Lithuania.

Article 5.

In legal cases of crimes specified in Articles 1 and 2 of this Law, interrogation shall be conducted by

investigators of the Procurator's Office of the Republic of Lithuania, and the above cases shall be investigated by the Area Courts of Lithuania.

Article 6.

This Law becomes effective from 15 April 1992.

Vytautas Landsbergis
President
Supreme Council [Official seal]
Republic Of Lithuania
Vilnius
9 April 1992
No. I-2477

(5)

No. 97-873

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

45 pp

QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against compelled self-incrimination based solely on a fear of prosecution by a foreign country.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-873

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 119 F.3d 122. The opinion of the district court (Pet. App. 53a-80a) is reported at 918 F. Supp. 588.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1997. A petition for rehearing was denied on September 25, 1997. Pet. App. 51a-52a. The petition for a writ of certiorari was filed on November 24, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

In 1993, the Department of Justice issued an administrative subpoena requiring respondent Aloyzas Balsys, a resident alien born in Lithuania, to appear for a deposition to answer questions relating to his activities in Europe during World War II and his immigration to the United States. At his deposition, respondent invoked the Fifth Amendment privilege against compelled self-incrimination and refused to answer any questions about his wartime activities or his immigration to the United States. The district court granted the government's petition to enforce the subpoena. Pet. App. 53a-80a. The court of appeals vacated the district court's order and remanded for further proceedings. *Id.* at 1a-50a.

1. Respondent is a resident alien of Lithuanian nationality. On May 2, 1961, he submitted an application for an immigrant visa and alien registration at the American Consulate in Liverpool, England. On his application, he stated that he had served in the Lithuanian army between 1934 and 1940, and that he had lived in hiding in Plateliai, Lithuania, between 1940 and 1944. He swore under oath that the answers on his immigrant visa application were true and correct. Pet. App. 3a, 54a; Gov't C.A. Br. 3.

Based on those answers, respondent was granted an immigrant visa. On June 30, 1961, he immigrated to the United States from England pursuant to the Immigration and Nationality Act, 8 U.S.C. 1201. He currently resides in New York. Pet. App. 3a, 54a.

The Office of Special Investigations of the Department of Justice (OSI) is investigating whether respondent illegally obtained admission to the United States by concealing assistance in Nazi persecution during World War II. OSI suspects that respondent was neither living in Plateliai, Lithuania, nor in hiding between 1940 and 1945. Rather, OSI suspects that he was living in Vilnius, Lithuania, and was a member of the Lithuanian Security Police, known as "Saugumas," which persecuted Jews and other civilians in collaboration with the Nazi government of Germany. Pet. App. 3a; Gov't C.A. Br. 3-4. If respondent did assist the forces of Nazi Germany in persecuting persons because of their race, religion, national origin, or political opinion, he would be subject to deportation under 8 U.S.C. 1182(a)(3)(E) (Supp. II 1996) and 1227(a)(4)(D) (Supp. II 1996). He may also be subject to deportation under 8 U.S.C. 1182(a)(6)(C)(i) (Supp. II 1996) and 1227(a)(1)(A) (Supp. II 1996) for lying under oath on his immigrant visa application about his activities during World War II. See Pet. App. 3a.

In 1993, OSI issued an administrative subpoena requiring respondent to appear for a deposition and to produce documents relating to his activities in Europe between 1940 and 1945 and to his immigration to the United States in 1961. At his deposition, respondent refused to answer any questions concerning his wartime activities or his immigration to the United States. He claimed that he had a right not to do so based on the Fifth Amendment privilege against compelled self-incrimination. He did not contend that his responses to OSI's inquiries could incriminate

him in any domestic prosecution.[1] Rather, he contended that those responses could subject him to prosecution in Lithuania, Israel, and Germany. Pet. App. 3a-4a, 55a, 57a; Gov't C.A. Br. 4-5.[2]

The government filed a petition for enforcement of the subpoena pursuant to 8 U.S.C. 1225(a) (Supp. II 1996). The district court granted the petition and ordered respondent to testify. Pet. App. 4a-7a, 53a-80a. Although the court found that respondent "faces a 'real and substantial' danger of prosecution by Lithuania and Israel," *id.* at 70a, the court held that respondent could not invoke the Fifth Amendment privilege to avoid giving testimony that would incriminate him solely in a foreign prosecution, *id.* at 71a-78a.

2. The court of appeals vacated the district court's order enforcing the administrative subpoena and remanded the case for further proceedings. Pet. App. 1a-50a. The court held that a witness who has a real and substantial fear of prosecution in a foreign country may assert the Fifth Amendment privilege to avoid giving testimony in a domestic proceeding, even if the witness has no valid fear of criminal prosecution in this country. *Id.* at 2a, 40a. The court acknowledged that other circuits had reached a contrary conclusion. *Id.* at 10a-11a (citing *United States* v. *(Under Seal) Araneta*, 794 F.2d 920 (4th Cir.), cert. denied, 479 U.S. 924 (1986); *In re Parker*, 411 F.2d 1067 (10th Cir. 1969), vacated as moot, 397 U.S. 96 (1970)).[3]

The court of appeals initially concluded that "[t]he language of the Fifth Amendment makes no distinction between self-incrimination in domestic and in foreign prosecutions." Pet. App. 8a. The court then turned to the question "whether allowing those who have reasonable fear of foreign prosecution to invoke the privilege 'promotes or defeats [the] policies and purposes'" served by the privilege. *Id.* at 15a-16a (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 54 (1964)).[4] First, the court found that "[p]ermitting a witness to invoke the Fifth Amendment to avoid incriminating himself in a foreign criminal case works to protect the dignity and privacy of the individual every bit as much as allowing the privilege in cases where the fear is of domestic prosecution." *Id.* at 16a. Second, the court reasoned that "[t]he systemic

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[1] As the court of appeals recognized, "[s]ince a deportation proceeding is a civil action and not a criminal prosecution, [respondent] does not have a Fifth Amendment right to refuse to answer questions posed to him for fear that such information might be used to deport him." Pet. App. 8a (citation omitted).

[2] In 1992, Lithuania adopted a statute providing for the punishment of Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. See Pet. App. 61a-62a & n.9. Israel imposes the death penalty on persons who "'during the period of the Nazi regime, in an enemy country,' committed crimes against Jewish people." See *id.* at 64a-65a & n.11. Germany has prosecuted persons suspected of crimes against Jews during World War II under its murder statute, although it is uncertain whether the statute may be applied to non-German citizens alleged to have committed murder outside Germany. See *id.* at 63a-64a & n.10.

[3] At the time of the decision below, a panel of the Eleventh Circuit had reached the same conclusion as the Second Circuit in this case. Subsequently, the en banc Eleventh Circuit reversed the panel, agreeing with the Fourth and Tenth Circuits. See *United States* v. *Gecas*, 120 F.3d 1419 (1997) (en banc), petition for cert. pending, No. 97-884.

[4] The United States did not challenge the district court's finding that respondent has a real and substantial danger of prosecution by Lithuania and Israel. Pet. App. 7a.

policies of American criminal justice that underl[ie] the Fifth Amendment"—such as the "state-individual balance" in criminal trials—"are neither promoted nor inhibited by allowing the privilege to be invoked in cases of fear of foreign prosecution." *Id.* at 17a. Third, the court decided that allowing persons who fear foreign prosecution to invoke the privilege furthered the purpose of preventing government overreaching. *Id.* at 17a-22a. The court suggested that, given the "[i]nternational collaboration in criminal prosecutions" in recent years, the government may have an incentive to use "abusive measures" to extract confessions for use in foreign prosecutions. *Id.* at 18a-21a.[5]

The court rejected the view of other circuit and district courts that domestic law enforcement would be seriously undermined if witnesses could invoke the Fifth Amendment privilege based solely on a fear of foreign prosecution. Pet. App. 26a-29a. The court acknowledged that allowing such witnesses to invoke the privilege "has costs for domestic law enforcement," because the United States cannot compel the witness's testimony by granting him immunity from foreign prosecution, as it can from domestic prosecution. *Id.* at 27a. But the court found "the strength of this objection to be exaggerated" (*ibid.*) for several reasons: those cases in which a witness can establish a real and substantial fear of foreign prosecution "rarely occur" (*id.* at 29a); a witness could ordinarily

[5] The court also found "significant support" for its view in *Murphy*'s "statement and acceptance of the English common law rule" that the privilege against compelled self-incrimination applied whether the witness was under a threat of domestic or foreign prosecution. Pet. App. 23a-25a (citing *Murphy*, 378 U.S. at 63).

invoke the privilege only with respect to foreign activities, whereas the principal focus of domestic law enforcement is on activities in the United States (*id.* at 31a); and the government could ask that adverse inferences be drawn against a witness in the domestic civil proceeding based on his refusal to testify (*id.* at 32a-33a). The court also suggested that Congress and the Executive Branch could "limit dramatically the domestic law enforcement costs of the interpretation of Fifth Amendment that we accept today by developing schemes that parallel domestic immunity statutes." *Id.* at 39a.[6]

Judge Meskill concurred in the result. Pet. App. 49a-50a. He cautioned that "our decision today should not be interpreted as *carte blanche* for honoring a Fifth Amendment privilege against self-incrimination in all domestic proceedings where the recipient of the subpoena has a well-founded fear of foreign prosecution" because "[o]ther scenarios may call for a different result." *Id.* at 49a. In his view, "[the] decision should be limited to the facts before us and to OSI proceedings." *Id.* at 50a.

District Judge Block wrote a concurring opinion, which Judge Calabresi joined. Pet. App. 43a-48a. Judge Block "express[ed] [his] concern, triggered by Judge Meskill's concurrence in the result, that [the] decision today may be perceived as qualifying the privilege in cases involving a real and substantial fear of foreign prosecution based upon a case-by-case analysis of domestic law enforcement." *Id.* at 43a-44a.

[6] The court also held that respondent had not waived the Fifth Amendment privilege by answering questions, under oath, concerning his World War II activities in his 1961 visa application. Pet. App. 40a-43a.

In his view, the application of the Fifth Amendment privilege to any witness who faces a real and substantial danger of foreign prosecution is "unqualified." *Id.* at 45a.

SUMMARY OF ARGUMENT

The Self-Incrimination Clause of the Fifth Amendment does not permit a witness to withhold testimony based on his fear that the testimony could incriminate him in a foreign prosecution. The reach of the Fifth Amendment is textually limited to compelled testimony that could cause an individual to become a witness against himself in a "criminal case." That reference is naturally read, in context, to refer solely to domestic prosecutions. The Sixth Amendment extends a variety of procedural protections to the accused in "all criminal prosecutions." Given the nature of those protections—such as the right to counsel and the right to a jury of the State and district in which the crime was committed—the Sixth Amendment plainly applies only to criminal cases in this country. The Fifth Amendment's coverage is similarly limited to domestic criminal cases. Any suggestion that its provisions apply to the actions of foreign sovereigns is inconsistent with the Constitution's general lack of extraterritorial application. There is no indication that the Framers intended a different scope for the privilege against compelled self-incrimination.

This Court's decisions support that conclusion. Before extending the Self-Incrimination Clause to the States through the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), this Court generally held that a witness could not assert the Fifth Amendment privilege based on a fear of prosecution

by a government other than the one compelling the testimony. Accordingly, a witness could not refuse to testify in a federal proceeding based on a fear of state prosecution. On the same day that it handed down *Malloy*, the Court rejected that view and permitted a witness's fear of prosecution in a different domestic jurisdiction to support a refusal to testify based on the Fifth Amendment. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964). But it remains true under *Murphy* that, in order to justify a refusal to give self-incriminating testimony, a witness must fear prosecution by a government subject to the Fifth Amendment. That is a characteristic of all domestic, but no foreign, governments. Nothing in *Murphy*'s analysis would justify extending the Fifth Amendment to protect against the use of compelled testimony in a foreign prosecution.

The purpose of the Self-Incrimination Clause likewise provides no justification for extending its reach to fears of foreign prosecution. The essential purpose of the Clause is to prevent the abuse of power that might occur if the federal government, or a State, could compel a witness to furnish its own prosecutors with the critical testimony needed to pursue criminal charges against him. Where the possibility of bringing a domestic prosecution based on a witness's testimony is eliminated, however—for example, by a grant of immunity—the perceived incentive for abuse disappears. The witness's testimony then may be compelled, even if the disclosures have other adverse legal or personal consequences for the witness. The same rule applies when there is no possibility of a domestic prosecution in the first place, but only the fear that an independent foreign government may use the compelled testimony in its own proceedings.

The expansion of the Self-Incrimination Clause to protect witnesses who fear only foreign prosecution would impair the federal government's ability to investigate and prosecute wrongdoing in a manner that the Framers could not have intended. They understood that governments could always overcome the privilege against compulsory self-incrimination by granting the witness immunity from prosecution. To be valid, however, the immunity must be coextensive with Fifth Amendment rights. The government cannot grant such immunity when the proceeding in which the witness fears incrimination would be brought by another country because the United States cannot control the actions of a foreign sovereign. Thus, if witnesses' fears of foreign prosecution can bar the government from compelling their testimony, the immunity statutes would be rendered ineffective as to such witnesses, and domestic law enforcement would be seriously hampered. In view of the increasingly international scope of crime, the loss of such evidence would unjustifiably injure vital national interests.

ARGUMENT

THE SELF-INCRIMINATION CLAUSE DOES NOT PERMIT A WITNESS TO WITHHOLD TESTIMONY BASED ON HIS FEAR THAT THE TESTIMONY COULD INCRIMINATE HIM IN A FOREIGN CRIMINAL PROSECUTION

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." The reference to "any criminal case" embraces any federal criminal prosecution, and, since this Court's ruling that the Self-Incrimination

Clause is applicable to the States through the Fourteenth Amendment, see *Malloy* v. *Hogan*, 378 U.S. 1 (1964), it also embraces any state criminal prosecution. A witness may therefore assert the protection of the Fifth Amendment based on a fear of either state or federal criminal prosecution, regardless of which entity is seeking to compel the testimony. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964). A foreign criminal prosecution, however, is not a "criminal case" within the meaning of the Self-Incrimination Clause. Accordingly, the Clause does not protect an individual against being compelled to give testimony that could incriminate him only in a foreign criminal prosecution.

A. The Fifth Amendment Privilege Is Textually Limited To Witnesses At Risk Of Domestic Prosecution

1. The phrase "any criminal case" in the Fifth Amendment derives meaning from its constitutional context. The Framers adopted the Bill of Rights in order "to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution." *New York Times Co.* v. *United States*, 403 U.S. 713, 716 (1971) (per curiam) (Black, J., concurring). The Framers did not seek to limit the powers of the States. Much less would they have sought to dictate the conduct of foreign governments. As Chief Justice Marshall explained, the Constitution's "limitations on power * * * are naturally, and, we think, necessarily, applicable to the government created by the instrument," and not to "distinct governments, framed by different persons and for different purposes." *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (holding Fifth Amendment's Just Compensa-

tion Clause inapplicable to the States). It is thus evident that the phrase "any criminal case," in context, was originally intended to refer only to a federal criminal case.

The Framers used similar terms elsewhere in the Bill of Rights to identify what could only have been domestic proceedings. The Sixth Amendment, for example, provides that "[i]n all criminal prosecutions," the accused has a right to "a speedy and public trial," to "an impartial jury of the State and district" where the crime occurred, to notice of the charges against him, to confront adverse witnesses and to compel the attendance of favorable ones, and to have the assistance of counsel. The reference to "all criminal prosecutions" in the Sixth Amendment clearly refers only to prosecutions in United States courts. The Sixth Amendment did not purport to govern the actions of state courts, let alone presume to dictate the rights to be accorded the accused in foreign courts. Indeed, if the Framers had intended the Sixth Amendment to apply abroad, the requirement that the jury be of "the State and district" where the crime occurred would be nonsensical. See also U.S. Const. Art III, § 2, cl. 3 (requiring that "[t]he Trial of all Crimes" be by jury "in the State where the said Crimes shall have been committed").[7]

This Court has recognized that these and other provisions of the Constitution do not apply to foreign proceedings, notwithstanding that "none of them is

[7] We have set out the texts of the Fifth and Sixth Amendments in an appendix to this brief, at 1a. See also U.S. Const. Amend. VII (providing for the right to jury trial in "Suits at common law, where the value in controversy shall exceed twenty dollars," thus plainly referring only to suits brought in the federal courts).

limited by its express terms, territorially or as to persons." *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950) (observing that the protections of the Bill of Rights do not extend to enemy aliens abroad); *Neely* v. *Henkel*, 180 U.S. 109, 122 (1901) ("the provisions of the Federal Constitution relating to the *writ of habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty, and property * * * have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country"); see Restatement (Third) of Foreign Relations Law § 433 cmt. a (1987) ("The Constitution and laws of the United States * * * do not govern foreign officials acting in their own countries.").

For those reasons, the reference to "any criminal case" in the Self-Incrimination Clause is most sensibly construed, consistent with the reference to "all criminal prosecutions" in the Sixth Amendment, as applying only to domestic criminal cases. Just as the Framers could not have intended to require foreign governments to provide jury trials in their courts, they could not have intended to prevent foreign governments from using compelled self-incriminating testimony in their prosecutions. As the Court has recognized in an analogous context, any such "extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment." *Johnson*, 339 U.S. at 784. But it did not.

This Court's decision in *Counselman* v. *Hitchcock*, 142 U.S. 547, 563 (1892), does not justify a broader understanding of a "criminal case" for purposes of the Self-Incrimination Clause. *Counselman* permitted a

witness to invoke the Fifth Amendment privilege to refuse to answer questions in a grand jury investigation. In so holding, the Court rejected an argument that, because a grand jury proceeding is not a "criminal prosecution" within the meaning of the Sixth Amendment, it cannot be a "criminal case" within the meaning of the Fifth Amendment. *Id.* at 562. The Court stated:

> A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments. It is entirely consistent with the language of article 5, that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

Id. at 563. While correctly holding that a grand jury witness may invoke Fifth Amendment rights, *Counselman*'s analysis of that issue, like other aspects of that opinion, has not stood the test of time. Cf. *Kastigar* v. *United States*, 406 U.S. 441 (1972) (rejecting "transactional immunity" test articulated in *Counselman* in favor of a "use and derivative use" immunity test).[8]

Cases since *Counselman* have made clear that the Fifth Amendment privilege may be invoked in any

[8] Likewise, the ruling in *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), that the Fifth Amendment may be triggered by "quasi-criminal" cases that are not otherwise criminal prosecutions within the meaning of the Sixth Amendment has been sharply limited, if not abandoned altogether, in later cases. See *United States* v. *Ward*, 448 U.S. 242, 253-255 (1980) (rejecting characterization of a penalty proceeding as "quasi-criminal" and noting that the Court "has declined * * * to give full scope to the reasoning and dicta in *Boyd*").

type of proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the witness] in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973); accord *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977); *Kastigar*, 406 U.S. at 444. What is essential is that the testimony might incriminate the witness in a later criminal proceeding:

> The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, *wherever the answer might tend to subject to criminal responsibility him who gives it.*

McCarthy v. *Arndstein*, 266 U.S. 34, 40 (1924) (emphasis added).

In light of that principle, the conclusion that a grand jury witness may rely on the Self-Incrimination Clause does not depend on characterizing the grand jury proceedings as a "criminal case," as *Counselman* suggested. Rather, what the witness must show is that his testimony might be used in a later "criminal case." And properly understood, the phrases "criminal case" in the Fifth Amendment and "criminal prosecution" in the Sixth Amendment are synonymous. See *Hudson* v. *United States*, 118 S. Ct. 488, 500 (1997) (Souter, J., concurring in the result) ("[T]here is obvious sense in employing common criteria to point up the criminal nature of a statute for purposes of both the Fifth and Sixth Amendments."). While those phrases encompass domestic criminal cases, a foreign proceeding of any variety does not constitute a "criminal case" or a "criminal

prosecution" within the scope of the Fifth and Sixth Amendments.

2. There is no surviving record that, in drafting the Fifth Amendment, the Framers expressly discussed whether the phrase "any criminal case" in the Self-Incrimination Clause was intended to apply only to domestic, and not foreign, prosecutions. The history surrounding the adoption and ratification of the Clause is sparse. See *United States* v. *Gecas*, 120 F.3d 1419, 1435 (11th Cir. 1997) (en banc) (noting that the Clause "has virtually no legislative history"), petition for cert. pending, No. 97-884. Representative James Madison drafted the Clause, and introduced it in the First Congress, without the phrase "any criminal case." The phrase was added at the suggestion of Representative John Laurence on the ground that the Clause would otherwise be "in some degree contrary to laws passed." See *Gecas*, 120 F.3d at 1456; *The Founders' Constitution* 262 (P. Kurland ed., 1987); see also Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086, 1123 (1994) (concluding that "the legislative history of the Fifth Amendment adds little to our understanding of the history of the privilege"). There is nothing to indicate that the Framers had foreign criminal prosecutions in mind.

Nor were the Framers operating against any settled understanding of the privilege against self-incrimination as it had developed in the common law of England and the American colonies. The privilege had not been not widely invoked by criminal defendants or witnesses as of that time. See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L.

Rev. 1047, 1084-1085 (1994) (concluding that privilege was only rarely asserted in English prosecutions until the 19th century); Moglen, *supra*, 92 Mich. L. Rev. at 1087 (noting that "Americans gave far more rhetorical than practical respect" to the privilege during the 18th century). There were consequently few judicial decisions addressing the scope of the privilege. And no court in this country had addressed whether the privilege protected a witness from giving testimony that could incriminate him only in a prosecution brought by an independent sovereign. Randall D. Guynn, Note, *The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used in a Foreign Country's Court*, 69 Va. L. Rev. 875, 894 (1983).

Two pre-constitutional English decisions did address self-incrimination claims involving a fear of prosecution in a separate court system. See *Murphy*, 378 U.S. at 58-59. But each case involved two judicial systems operating under the same sovereign. *East India Co.* v. *Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (1749) (testimony could be withheld in English court based on fear of incrimination in a court sitting in India, which was then an English colony); *Brownsword* v. *Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (1750) (testimony could be withheld in a court of equity based on fear of incrimination in an ecclesiastical court). Those decisions do not support any suggestion that the Framers would have understood the Self-Incrimination Clause of the Fifth Amendment to protect witnesses based on fears of prosecution by an independent foreign government.

B. This Court's Decisions Support Limiting The Self-Incrimination Clause To Witnesses At Risk Of Domestic Prosecution

The conclusion that an individual may assert the Fifth Amendment to avoid incriminating himself only in a domestic "criminal case" finds support in decisions of this Court. Before this Court extended the Self-Incrimination Clause to the States through the Fourteenth Amendment in *Malloy* v. *Hogan*, *supra*, the Court generally held that a witness could not invoke the Fifth Amendment privilege based on a fear of prosecution in a jurisdiction other than the one compelling his testimony. Accordingly, a witness's fear of state prosecution did not justify his withholding testimony from a federal tribunal. Simultaneously with its decision in *Malloy*, the Court rejected that view and permitted inter-jurisdictional fears of prosecution to support a claim of the Fifth Amendment privilege. *Murphy*, *supra*, But it remains true under *Murphy* that, in order to justify a refusal to give self-incriminating testimony, a witness must fear prosecution in a jurisdiction subject to the Fifth Amendment. That is a characteristic that no foreign jurisdiction possesses.

1. This Court's treatment of witnesses who have refused to testify based on fears of prosecution in another jurisdiction has changed over time. The Court's first encounter with the issue occurred in *United States* v. *Saline Bank*, 26 U.S. (1 Pet.) 100 (1828). There, the government filed a bill of discovery in federal district court against stockholders of a Virginia bank, and the stockholders were allowed to avoid discovery that could have subjected them to prosecution under state law. In a brief opinion, which

did not explicitly mention the Fifth Amendment, the Court stated that "[t]he rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." *Id.* at 104; see also *Ballmann* v. *Fagin*, 200 U.S. 186, 195-196 (1906) (following *Saline Bank* without analysis). In *Murphy*, this Court read *Saline Bank* as permitting the assertion of the Fifth Amendment privilege in federal court based on a fear of prosecution in state court. *Murphy*, 378 U.S. at 60, 68-69 & n.11. But *Saline Bank* itself neither cited the Fifth Amendment nor offered any explanation for why the Fifth Amendment would apply in that setting.[9]

In a series of later cases—all preceding the extension of the Self-Incrimination Clause to the States—the Court held that a witness in a federal proceeding could not invoke the Fifth Amendment privilege based on a fear of state prosecution. *United States* v. *Murdock*, 284 U.S. 141 (1931); *Hale* v. *Henkel*, 201 U.S. 43 (1906); cf. *Brown* v. *Walker*, 161 U.S. 591, 606 (1896) (dicta). The Court likewise held that a witness in a

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[9] The *Murphy* Court supported its statement that *Saline Bank* rested on the Self-Incrimination Clause by noting the two 18th century English precedents discussed above, see p. 17, *supra*. *Murphy*, 378 U.S. at 69 (citing *East India Co.*, *supra*; *Brownsword*, *supra*). Those cases, however, lend no support to the view that *Saline Bank* rests on constitutional grounds; indeed, those English antecedents suggest a basis in equity jurisprudence for *Saline Bank*. See also Jack Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 Colum. L. Rev. 816, 818 n.16 (1960) (*Saline Bank* has been explained "as an example of the abhorrence of forfeitures at equity"), citing John T. McNaughton, *Self-Incrimination Under Foreign Law*, 45 Va. L. Rev. 1299, 1305-1306 (1959). As for *Ballmann*, it involved disclosures that would have been incriminating under both federal and state law. 200 U.S. at 195-196.

state proceeding could not invoke the Fifth Amendment privilege based on a fear of federal prosecution. *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Feldman* v. *United States*, 322 U.S. 487, 489-494 (1944); accord *Mills* v. *Louisiana*, 360 U.S. 230 (1959). All of those cases rested on the principle that "the privilege against testifying * * * pertains to a prosecution in the same jurisdiction." *Feldman*, 322 U.S. at 493; see also *Hale*, 201 U.S. at 69 ("the only danger [of self-incrimination] to be considered is one arising within the same jurisdiction and under the same sovereignty"). The Court reasoned that the Fifth Amendment privilege was intended by the Framers only "as a restraint upon compulsion of testimony by the newly organized Federal Government at which the Bill of Rights was directed, and not as a general declaration of policy against compelling testimony." *Knapp*, 357 U.S. at 379-380. Consequently, a witness could not refuse to testify based on a fear of prosecution by a jurisdiction that was not bound by the Fifth Amendment.

A number of state courts had similarly held, before *Malloy*, that the self-incrimination protections of their own constitutions did not protect an individual from being compelled to give testimony that could be used against him by the federal government, by another State, or by a foreign country. It was sufficient that the witness could not be prosecuted by the government compelling the testimony. See John T. McNaughton, *Self-Incrimination Under Foreign Law*, 45 Va. L. Rev. 1299, 1304-1305 (1959) (describing that as the "orthodox," although not unanimous, position among the state courts); see also, *e.g.*, *Republic of Greece* v. *Koukouras*, 162 N.E. 345, 347 (Mass. 1928) (incrimination under foreign law); *Dunham* v. *Ottinger*, 154 N.E. 298, 302 (N.Y. 1926) (incrimination under federal law); *State* v. *March*, 46 N.C. 526, 527-528 (1854) (incrimination under law of another State). The Model Code of Evidence and the Uniform Rules of Evidence provided a privilege only for testimony that would implicate a witness in "a violation of the laws of this State." McNaughton, *supra*, 45 Va. L. Rev. at 1305 & nn. 45, 46 (quoting Model Code of Evidence Rule 202 (1942) and Unif. R. Evid. 24).

2. In *Murphy*, 378 U.S. at 77-78, the Court changed course and held that the Fifth Amendment "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *Murphy* did not hold that a fear of prosecution in any jurisdiction whatsoever could support the invocation of the Fifth Amendment privilege. Rather,

> [r]econsideration of the rule that the Fifth Amendment privilege does not protect a witness in one jurisdiction against being compelled to give testimony that could be used to convict him in another jurisdiction was made necessary by the decision in *Malloy* v. *Hogan*, in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment.

Kastigar, 406 U.S. at 456 n.42 (citations omitted). The Court explained in *Murphy* that the purposes of the Self-Incrimination Clause would be "defeated" if "a witness [could] be whipsawed into incriminating himself under both state and federal law *even though the constitutional privilege against self-incrimination is applicable to each*." 378 U.S. at 55 (emphasis added; internal quotation marks omitted).

Murphy thus ensures that a witness receives Fifth Amendment protections against the use of his compelled testimony in any criminal trial in this country, whether or not the "compelling" sovereign and the "using" sovereign are one and the same. The Court expressly limited its decision in *Murphy* to "jurisdiction[s] within our federal structure," 378 U.S. at 77—that is, to jurisdictions that are bound by the Self-Incrimination Clause. *Id.* at 54; accord *Kastigar*, 406 U.S. at 456-457.

The potential for circumvention of the Self-Incrimination Clause that concerned the Court in *Murphy* does not exist when only the government compelling the testimony, and not the government using it, is bound by the Clause. *Murphy* guards against the danger that a witness could find himself at risk of self-incrimination in one jurisdiction bound by the Fifth Amendment (*e.g.*, a State) after having been compelled to testify by another jurisdiction bound by the Fifth Amendment (*e.g.*, the federal government). Two jurisdictions in this country, both bound by the Fifth Amendment, should not be able collectively to bypass that constitutional protection.

No such incongruous result occurs when the Fifth Amendment binds only the "compelling" sovereign, but not the "using" sovereign. The essential proscription of the Fifth Amendment bars the use of a witness's compelled testimony in his own criminal trial. "The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (citations omitted).

Because foreign governments are not precluded by the United States Constitution from making use of "compelled" testimony at trial, the United States does not circumvent the Constitution if it compels a witness to testify in a domestic proceeding notwithstanding his fear of foreign prosecution. Even if the compelled testimony is later used against the witness in a foreign prosecution, a constitutional violation cannot occur when the "using" sovereign is an independent foreign government.[10]

3. The Court suggested in *Murphy* that its holding was consistent with "the settled 'English rule' regarding self-incrimination under foreign law." 378 U.S. at 63. Justice Harlan's concurring opinion in *Murphy*, subsequent legal scholarship, and develop-

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[10] The United States cannot properly be deemed the "using" sovereign simply because it may, at some future time, provide evidence or similarly cooperate in a foreign prosecution of the witness. See *Gecas*, 120 F.3d at 1433-1434 (rejecting similar argument); Pet. App. 20a (discussing potential cooperation between United States and other countries with regard to suspected Nazi collaborators). This Court has recognized that such cooperation between the federal and state governments does not transform a state prosecution into a federal prosecution for purposes of the Double Jeopardy Clause. *Bartkus* v. *Illinois*, 359 U.S. 121, 122-124 (1959) (rejecting double jeopardy claim where federal officials turned over all evidence they had gathered in connection with federal prosecution of defendant for use in subsequent state prosecution of defendant); accord *United States* v. *Figueroa-Soto*, 938 F.2d 1015, 1018-1019 (9th Cir. 1991), cert. denied, 502 U.S. 1098 (1992); *United States* v. *Paiz*, 905 F.2d 1014, 1023-1024 (7th Cir. 1990), cert. denied, 499 U.S. 924 (1991); *United States* v. *Russotti*, 717 F.2d 27, 30-31 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984). No more demanding test should apply here, especially in light of the inability of the United States to control the actions of a foreign nation.

ments in Great Britain itself suggest that English law was not at all "settled" in that regard. See *Murphy*, 378 U.S. at 81 n.1 (Harlan, J., concurring); Guynn, *supra*, 69 Va. L. Rev. at 893-894; Diego A. Rotsztain, Note, *The Fifth Amendment Privilege Against Self-Incrimination and Fear of Foreign Prosecution*, 96 Colum. L. Rev. 1940, 1945-1946, 1948-1949 (1996). Closely examined, the English cases do not support an assertion of the Fifth Amendment privilege based on a fear of foreign prosecution.

Murphy placed primary emphasis on two 19th century English cases that addressed whether a witness could refuse to testify in an English court based on a fear of prosecution in a foreign country.[11] The first of those cases held that witnesses could *not* be compelled to testify in such circumstances, explaining that the privilege "is confined to what may tend to subject a party to penalties by our own laws." *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N.S.) 301, 331, 61 Eng. Rep. 116, 128 (1851). The second was a civil proceeding brought in an English court by the United States against a former agent of the Confederacy, in which the United States sought testimony from the defendant that would have subjected his U.S. property to forfeiture. *United States* v. *McRae*, L.R.-3 Ch. App. 79 (1867). In upholding the defendant's refusal to testify, the Lord Chancellor acknowledged that *King of the Two Sicilies* was "most correctly

[11] *Murphy* also discussed two English cases that arose in the 18th century, but the Court appeared to place little weight on them. *Murphy*, 378 U.S. at 69 (citing *East India Co.*, *supra*; *Brownsword*, *supra*). In any event, as discussed above (see p. 17, *supra*), those cases involve proceedings in two judicial systems operating under the same sovereign. They therefore shed no light on the issue in this case.

decided," but opined that the general rule stated in that case was unduly broad. *Id.* at 85. The Lord Chancellor declined to apply the *King of the Two Sicilies* rule in *McRae* because the English courts did not have to speculate on whether the defendant's testimony would actually have adverse consequences for him abroad: No dispute existed as to the relevant United States law, and the United States already had the defendant's property "within [its] power." 3 Ch. App. at 85-87.

It is unclear what relevance the two 19th century English cases cited by the Court in *Murphy* might have to the construction of the Fifth Amendment. Those decisions came long after the ratification of the Bill of Rights, and they therefore cannot illuminate the Framers' intent. See *Brown*, 161 U.S. at 600 (recognizing that English cases applying the self-incrimination privilege are relevant to the extent that they reveal its "known and settled construction" at the time of ratification); see also *United States* v. *Gaudin*, 515 U.S. 506, 515-516 (1995).

In any event, the British commentators did not take the view that *McRae* settled the question whether the self-incrimination privilege could be invoked based on a fear of foreign prosecution. See Guynn, *supra*, 69 Va. L. Rev. at 893 & n.116 (quoting from treatises indicating that uncertainty over whether privilege protected against foreign incrimination persisted for "nearly a century" after *McRae*). Nor did the British Law Reform Committee. In 1967, the Committee recommended to Parliament that the privilege be limited by statute to evidence that could incriminate a witness in a domestic prosecution, explaining that "[t]here are no recent authorities as to whether a person may claim privilege to refuse to

answer questions or to produce documents that might incriminate him under foreign law and the two old authorities (*King of the Two Sicilies* v. *Willcox* . . . and *U.S.A.* v. *McRae* . . .) are not wholly consistent." *Id.* at 893-894 (quoting Law Reform Committee, Sixteenth Report, Cmd. 3472, No. 113, at 7 (1967)). Parliament adopted the proposed restriction on the self-incrimination privilege in 1968. *Id.* at 894 & n.118 (citing Civil Evidence Act, 1968, § 14). That history suggests that the *Murphy* Court overstated matters in concluding that *United States* v. *McRae* represented the "settled" and "authoritative" English rule. 378 U.S. at 67.

C. The Purposes Of The Self-Incrimination Clause Do Not Justify Its Extension To Fears Of Foreign Prosecution

The principal purpose of the Fifth Amendment privilege is to prevent "abuses [of] power" by our government. *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956). The Self-Incrimination Clause is designed to deny the federal government and, through the Fourteenth Amendment, the States the ability to extract incriminating admissions from an individual that those governments could then use to prosecute him.

> Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused."

Doe v. *United States*, 487 U.S. 201, 212 (1988) (citations and emphasis omitted) (quoting *Ullmann*, 350 U.S. at 427); see also *Murphy*, 378 U.S. at 55.

The purpose of preventing abuses of power by the prosecution in the compulsion of incriminating testimony is fully served if the Fifth Amendment privilege is limited to persons at risk of domestic prosecution. As the Court implicitly recognized in *Kastigar*, once the government agrees not to prosecute a witness based on his own statements, the potential for the sort of abuse of power that motivated the Self-Incrimination Clause disappears. See *Kastigar*, 406 U.S. at 446 (explaining that grants of immunity represent "a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify"). The witness's testimony may well have other adverse consequences, including the imposition of civil sanctions by the government itself. See *United States* v. *Ward*, 448 U.S. 242, 248-251 (1980) (civil penalty proceeding not a "criminal case" for purposes of the Self-Incrimination Clause); *Brown*, 161 U.S. at 596 (the privilege does not "protect witnesses against every possible detriment which might happen to them from their testimony"). But those consequences are not thought likely to incite the abuses of power against which the Self-Incrimination Clause guards. The

same is true when the government cannot prosecute the witness because his conduct would be a crime only in a foreign country. As one authority put it, "[w]here the crime is a foreign crime, any motive to inflict brutality upon a person because of the incriminating nature of the disclosure—any 'conviction hunger' as such—is absent." 8 John H. Wigmore, *Evidence*, § 2258, at 345 (McNaughton rev. 1961) (quoted in *Murphy*, 378 U.S. at 56 n.5).

The court of appeals agreed that such "'[c]onviction hunger' seems unlikely when the prosecution does not intend to eat." Pet. App. 18a. But the court nonetheless perceived some risk of abuse of power by the federal government because of its "significant stake in many foreign criminal cases." *Id.* at 19a. The court suggested that the government might "take abusive measures" to obtain evidence that could be turned over to a foreign government for its use in prosecuting the witness. *Id.* at 21a. The court's rationale proves too much. It would apply even more strongly when the United States seeks self-incriminating testimony from a witness, under a grant of immunity, so that the United States itself may prosecute the witness's more culpable conspirators. The government's incentive to "take abusive measures" would, if anything, be greater where the testimony could be used in its own prosecution. But *Kastigar* perceived no potential in such circumstances for the sort of abuse that motivated the Self-Incrimination Clause.

The court of appeals also opined that limiting the Fifth Amendment privilege to persons subject to domestic prosecution would not adequately serve the values of "individual integrity and privacy." Pet. App. 15a-16a. As the Court has recognized, however, "the

privilege has never been given the full scope which the values it helps to protect suggest." *Schmerber* v. *California*, 384 U.S. 757, 762 (1966). That is particularly so with respect to the values of "individual integrity and privacy." See *Doe*, 487 U.S. at 213 n.11 (finding no violation of the Self-Incrimination Clause "[d]espite the impact upon the inviolability of the human personality"). The privilege does not protect an individual from being compelled to reveal the most intimate information about himself so long as the information does not implicate him in a crime. It does not protect an individual from being forced to provide samples of his voice, his handwriting, or his blood, even if that evidence is incriminating Nor does it protect him from having to disclose secrets that could incriminate his parent, his child, or his closest friend. See, *e.g.*, *Schmerber*, 384 U.S. at 760-765 (blood samples); *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) (private retribution); *Ullmann*, 350 U.S. at 430-431 (loss of job and public opprobrium). Even when the testimony is self-incriminating, the government may compel the testimony, and thereby intrude on the individual's privacy, by obtaining a grant of immunity. Privacy concerns should carry no greater force in this context, where the witness resists testimony not because of a fear of domestic prosecution, but because of a fear of prosecution only in a foreign country.

The court of appeals acknowledged (Pet. App. 17a) that the other values served by the Self-Incrimination Clause—"an accusatorial system, a 'fair state-individual balance' in criminal trials, and trial evidence of the highest reliability"—are "of no real significance in cases of this sort" where, if any criminal prosecution occurs, it will take place in another

country, under that country's laws and procedures. The United States cannot dictate the laws and procedures that other countries use in prosecuting crimes in their own courts. See Restatement (Third) of Foreign Relations Law, *supra*, at § 433 cmt. a.

D. The Extension Of The Self-Incrimination Clause To Fears Of Foreign Prosecution Would Have Serious Consequences For Domestic Law Enforcement

The extension of the Self-Incrimination Clause to fears of foreign prosecution would seriously hamper domestic proceedings. The federal government can grant a witness immunity from prosecution, both state and federal, and then can compel the witness to testify against himself. See *Kastigar*, 406 U.S. at 449 (rejecting Fifth Amendment challenge to 18 U.S.C. 6002, which provides witness with use and derivative use immunity in "any criminal case," because "the immunity granted under this statute is coextensive with the scope of the privilege"). But the federal government cannot grant a witness immunity from the use of his testimony in a foreign prosecution. Consequently, if a witness may assert the Fifth Amendment privilege based on a fear of foreign prosecution, the federal government has no means of compelling the witness to testify, regardless of how great the government's need for that testimony to investigate past crimes, to apprehend and prosecute others involved in those crimes, and to deter future crimes. The government would thus be denied what this Court has described as "[a]mong the necessary and most important of the powers of * * * the Federal Government to assure the effective functioning of government in an ordered society." *Id.* at 444 (quoting *Murphy*, 378 U.S. at 93 (White, J., concurring)).

1. The Framers could not have intended the Self-Incrimination Clause to act as an absolute bar on the federal government's ability to exercise its important power to compel testimony. Historically, where the privilege against self-incrimination has been asserted, governments have been free to overcome it by providing the witness with immunity from prosecution. The Court has noted that immunity statutes "have historical roots deep in Anglo-American jurisprudence." *Kastigar*, 406 U.S. at 445. Indeed, "[s]oon after the privilege against compulsory self-incrimination became firmly established in law, it was recognized that the privilege did not apply when immunity, or 'indemnity' in the English usage, had been granted." *Id.* at 445 n.13. The colonial legislatures of New York and Pennsylvania enacted immunity statutes in the 18th century, *ibid.*, some years before the privilege against self-incrimination was written into the Constitution. And federal immunity statutes have existed since 1857. *Ibid.*

It is reasonable to conclude that the Framers intended the Self-Incrimination Clause to be no broader than the government's power to grant immunity. Indeed, in *Lefkowitz* v. *Turley*, 414 U.S. at 84, the Court stated that "accommodation between the interest of the State and the Fifth Amendment requires that the State have means at its disposal to secure testimony if immunity is supplied and testimony is still refused." See also *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 252 (1983) ("It is settled that government must have the power to compel testimony to secure information necessary for effective law enforcement.") (internal quotation marks omitted). That principle presupposes that the States and the federal government have the means to grant immunity when

they wish to procure needed testimony—a premise that would be hollow if a witness could still avoid giving that testimony based on a fear of prosecution abroad. If such fears could support a valid invocation of the privilege, "our own national sovereignty would be compromised," because "our system of criminal justice [would be] made to depend on the actions of foreign governments beyond our control." *United States* v. *(Under Seal) Araneta*, 794 F.2d 920, 926 (4th Cir.), cert. denied, 479 U.S. 924 (1986); accord *Gecas*, 120 F.3d at 1434. Those who had so recently struggled for independence from foreign control could not have intended such a result.

2. The *Murphy* Court's extension of the Fifth Amendment privilege within our system of "cooperative federalism," 378 U.S. at 56, did not limit the ability of either the federal government or the States to enforce their own laws. The States could continue to "secure information necessary for effective law enforcement" by compelling witnesses to testify under grants of immunity from state prosecution—even though the States were without the power to grant such witnesses immunity from federal prosecution—because the Court adopted an exclusionary rule prohibiting the federal government from making any use of the compelled testimony to prosecute the witness. *Id.* at 79. Nor did *Murphy* impede the federal government's ability to investigate violations of federal law, because it is settled that the federal government can grant federal witnesses the necessary immunity in state as well as federal prosecutions. *Adams* v. *Maryland*, 347 U.S. 179, 183 (1954).

The "accommodat[ion]" that the Court achieved in *Murphy* between the demands of the Fifth Amendment and "the interests of the State and Federal Governments in investigating and prosecuting crime," 378 U.S. at 79, could not be achieved if the Fifth Amendment privilege were extended to protect witnesses from foreign prosecution. Neither the federal government nor the States have the authority to grant a witness immunity from prosecution by a foreign government. Nor can any court in the United States exercise its supervisory power to adopt an exclusionary rule, as this Court did in *Murphy*, to prohibit foreign governments from using the compelled testimony of a witness granted immunity by the federal government or a State. The only apparent means of protecting the witness from foreign prosecution based on his self-incriminating testimony would be to prohibit the federal government and the States from compelling such testimony in the first place.

3. Any such prohibition would necessarily undermine the ability of the federal government and the States to enforce their criminal and, as here, civil laws. This Court has recognized that "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." *Kastigar*, 406 U.S. at 446. The difficulties of developing alternative sources of evidence are compounded when the criminal activity crosses national borders. The only other witnesses to crucial events may reside abroad. A foreign government may be unwilling or unable to assist the United States in gaining access to witnesses or to other types of evidence. And when the events that the United States is investigating occurred many years ago—as in the case of individuals who are suspected of having obtained entry to this country illegally by concealing

their collaboration with the forces of Nazi Germany—no other surviving witness may exist.

The question whether the Fifth Amendment privilege protects against compulsory self-incrimination in a foreign prosecution is of considerable importance to the federal government and the States. As a result of modern means of transportation and communication, criminals are operating internationally with ever greater frequency. The President has warned of the growing incidence of "international organized crime, drug trafficking, [and] terrorism" that cross national boundaries. President's Remarks to the United Nations General Assembly, 31 Weekly Comp. Pres. Doc. 1909, 1910 (Oct. 22, 1995); see also *Remarks of Attorney General Janet Reno*, 40 St. Louis U. L.J. 1009, 1009 (1996) (commenting on "the ever-growing threat of international crime"). And white-collar crimes, such as antitrust conspiracies and securities frauds, increasingly involve conduct or consequences in more than one country. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 Harv. Int'l L. J. 37, 38 (1990) (noting increasingly international character of, *inter alia*, "securities, tax, and commercial fraud"); Howard Adler Jr. & David J. Laing, *The Explosion of International Criminal Antitrust Enforcement*, Business Crimes Bulletin: Compliance and Litigation, March 1997, at 1, 1 (in early 1997, "more than 20 grand juries" in the United States were investigating "international cartel activities," which involved businesses and individuals "located in 20 countries on four continents").

4. Contrary to the view of the court of appeals (Pet. App. 29a-33a), the United States' interests are not adequately served by allowing a witness to assert

the Fifth Amendment privilege only when his fear of foreign prosecution is "real and substantial." Cf. *Zicarelli* v. *New Jersey Comm'n of Investigation*, 406 U.S. 472 (1972) (declining to reach the question presented in this case because the witness lacked a real and substantial fear of prosecution abroad). The United States' interest in investigating and prosecuting a crime—and, as here, in deporting its perpetrators—is no less valid simply because a foreign power may also be interested in doing so. Indeed, when the harm caused by a transnational criminal scheme is widespread and substantial, multiple governments may have a legitimate interest in investigating and prosecuting various aspects of the scheme.[12] It is also possible that a rogue government may assert an interest in prosecuting a witness not for any legitimate reason, but merely to prevent the United States from compelling his testimony about terrorism or other activity inimical to our national interests. See *United States* v. *Lileikis*, 899 F. Supp. 802, 807 & n.9 (D. Mass. 1995) ("a renegade state [might] seek[] to protect the bosses of a drug cartel or the leaders of a

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[12] The demise of the Bank of Credit and Commerce International (BCCI) in the late 1980s, for example, gave rise to criminal prosecutions and regulatory proceedings in multiple countries, including the United States, the United Kingdom, Luxembourg, the United Arab Emirates, and Hong Kong. See, *e.g.*, *BCCI Holdings* v. *Mahfouz*, No. 92-2763, 1993 WL 45221, at *2 (D.D.C. Feb. 12, 1993); *United States* v. *BCCI Holdings*, No. 91-0655, 1992 WL 100334, at *3 (D.D.C. Jan. 24, 1992); see also Sharon Walsh, *Clifford, Altman Settle BCCI Case*, Washington Post (Feb. 4, 1998) at A1; Matthew Rose, *BCCI's Biggest Borrower, Abbas Gokal, Is Convicted for His Part in Huge Fraud*, Wall Street Journal (Apr. 4, 1997) at A6; *Fines Are Raised in BCCI Case*, New York Times (June 10, 1996) at D4; *BCCI Updates*, Wall Street Journal (Nov. 17, 1995) at A18.

terrorist organization by threatening the prosecution of lieutenants granted immunity as a means of compelling their testimony").

The "real and substantial fear of prosecution" standard, moreover, is not a workable one in the context of foreign prosecutions. It can be difficult for an American court to ascertain and analyze the law of a foreign country, especially when the language and the legal system are quite different from our own. It is even more difficult to assess the probabilities of a foreign government's actually choosing to prosecute a particular individual who is currently outside its reach. And the court must conduct its analysis without knowing precisely what the witness's testimony might be. See Rotsztain, *supra*, 96 Colum. L. Rev. at 1966 (arguing that "no manageable threshold test exists—or can exist—to distinguish between valid and specious claims that a risk of [foreign] prosecutions exists"). The difficulty of ascertaining whether an individual is actually at risk of foreign prosecution thus provides further reason to construe the Self-Incrimination Clause, consistent with its text and purpose, as protecting only against a risk of domestic prosecution.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(8)

No. 97-873

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALOYZAS BALSYS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI
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BRIEF FOR THE RESPONDENT

SUMMARY OF THE ARGUMENT

In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), the Court overruled those precedents that were inconsistent with the historically recognized policies and purposes of the privilege against self-incrimination. Withholding the privilege from those who fear foreign prosecution also defeats the policies and purposes of the privilege. The paramount purpose of the privilege against self-incrimination is to safeguard individual liberty. It is not a mere limitation on the rights of the government. Confronting the individual with the cruel trilemma of self-accusation, perjury or contempt, is an impermissible government intrusion upon the privacy and dignity of the individual. The individual's integrity is

compromised when the compulsion takes place, not when the feared criminal prosecution ensues. Thus, the venue of the feared criminal prosecution ought not determine if the privilege can be invoked.

The Court of Appeals recognized the *Murphy* Court's perception of the policies and purposes of the privilege and rejected the narrow view advocated by the government that resurrects the overruled authorities and exalts the needs and convenience of the government. If the privilege were to be limited to fears of domestic prosecution only, a large part its policies and purposes would be defeated. Also defeated would be the expanding recognition of human rights and civil liberties that goes hand in hand with "cooperative internationalism" in law enforcement so actively being promoted by the United States.

The government's exaggerated claims notwithstanding, impairment of law enforcement efficiency resulting from recognition of the privilege will be negligible. Moreover, the privilege cannot yield regardless how grave the impairment of the government's law enforcement needs may be. Balancing of the competing interests is impermissible. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

ARGUMENT

POINT I

THE PRIVILEGE IS A FUNDAMENTAL RIGHT OF THE INDIVIDUAL RATHER THAN A MERE LIMITATION ON THE RIGHTS OF THE GOVERNMENT

The privilege has been described as "one of the most valuable prerogative of the citizen." *Brown v. Walker*, 161 U.S. 591, 610 (1896). "The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a

Constitutional Amendment." *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). The notion that the privilege is only available for certain types of citizens or residents has been emphatically rejected. "We find no room in the privilege against self-incrimination for classification of people so as to deny it to some and extend it to others." *Spevack v. Klein*, 385 U.S. 511, 516 (1967). Whether they be the school teacher in *Slochowen v. Board of Education*, 350 U.S. 551 (1956), the policemen in *Garrity v. New Jersey*, 388 U.S. 493 (1967), or the lawyer in *Spevack v. Klein*, *supra*, they all "enjoy first-class citizenship." Id. Similarly, there ought not be classification of people according to what criminal prosecution they fear, domestic or foreign.

The Court has traditionally given the privilege a broad construction. It "must not be interpreted in a hostile or niggardly spirit." *Ullmann v. United States*, 350 U.S. 422, 426 (1956); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Boyd v. United States*, 116 U.S. 616, 635 (1886). The historical development of the privilege is reviewed in *United States v. Gecas*, 120 F.3d 1419, 1435-1457 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, and also *Moses v. Allard*, 131 B.R.W. 328, 341-342 (E.D. Mich. 1991).

An important purpose, if not the main purpose, of the privilege is to protect the individual's privacy and his dignity and integrity as a person. It is a right with which individuals are vested, not a burden imposed on one sovereign or another. This Court described it in *Malloy v. Hogan*, 378 U.S. 1, 11 (1964): "What is accorded is a privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities." Thus, the immunity statute allowing the government to compel incriminating testimony does so by ensuring that the witness's privilege is not abridged. "[P]rotection coextensive with the privilege is the degree of protection that the Constitution requires." *Kastigar v. United States*, 406 U.S. 411, 459 (1972). An interrelated, but not dominant, interest is the preservation of an accusatorial system of criminal justice. In *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964), those interrelated interests were characterized thusly:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, ...'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' , our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'

The individual liberty component clearly predominates in this expression of the policies and purposes of the privilege against self-incrimination. The Court of Appeals recognized the predominance of this concern for the individual by placing it at the top of its list of values promoted by the privilege. Pet. App. 16a.

The government fails to recognize the individual liberty component and advocates instead a single purpose, "to prevent the abuse of power." G. Br. 9, 26. But in *Murphy*, the Court emphasized not the "interests of the state or federal government in law enforcement and use of testimony, but the multiple policies behind an expansive interpretation of this ancient privilege" and the "fundamental values and noble aspirations" it reflects. 378 U.S. at 55, 56 n.5. The Court stated:

> It will not do ... to assign one isolated policy to the [fifth amendment] privilege, and then to argue that since "the" policy may not be furthered measurably across state-federal lines, it follows that the privilege should not be so applied.

However, the view of the Fourth, Tenth and Eleventh Circuits is just such a narrow approach.[1] The broad interpretation of the privilege in *Murphy* has not been disaffirmed by other major Fifth Amendment cases, *see e.g., Kastigar v. United States*, 406 U.S. 441 (1972) and *Doe v. United States*, 487 U.S. 201 (1988), as the government seems to suggest. G. Br. 27. Neither is *Murphy* impaired by footnote 42 at 406 U.S. 456 of the *Kastigar* opinion. The *Murphy* decision can also be supported on *United States v. Saline Bank*, 26 U.S. 100 (1828), and *Ballmann v. Fagin*, 200 U.S. 186 (1906), two cases that were decided before *Malloy* applied the Fifth Amendment to the states.

The government attempts to further denigrate and restrict the privilege by speculating, without citing any authority, that the Framers never intended it to have a broader application than the Sixth Amendment's reference to "all criminal prosecutions" in domestic courts. G. Br. 11-16. The short answer is that if that were so, the Framers should have included the privilege in the Sixth Amendment. Moreover, *Counselman v. Hitchcock*, 142 U.S. 547, 563, has withstood the test of time on that point.

The government attempts to obliterate the individual liberties component and ignore the "cruel trilemma" that occurs at the time of compulsion by the notion that the violation occurs only at trial, and since the trial will not take place in the United States, there is no violation. G. Br. 22. Thus, the government seeks to relegate the privilege to the status of a "prophylactic rule," as the plurality opinion did in *Gecas*, 120 F.3d at 1429. The government's reliance on *Kastigar* and *United States v. Verdugo-Urquides*, 494 U.S. 259, 264 (1990), for the proposition that the

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[1] *United States v. (Under Seal)*, 807 F.2d 374 (4th Cir. 1986), *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir. 1986), *cert. den.* 479 U.S. 924, 107 S. Ct. 331, 93 L. Ed. 2d 303 (1986). See also *In Re Grand Jury Proceedings, No. 700*, 817 F.2d 1108 (4th Cir. 1987), declining to reconsider the issue. *In Re Grand Jury Proceedings 82-2*, 705 F.2d 1224 (10th Cir. 1982), *cert. den.* 103 S. Ct. 2087; *In Re Parker*, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom, *Parker v. United States*, 397 U.S. 96, 90 S. Ct. 819, 25 L. Ed. 2d 81 (1970). *United States v. Gecas*, 120 F.3d 1419 (1997) (en banc), petition for cert. pending, No. 97-884.

violation occurs only at trial is misplaced. *Verdugo* has to be read in its proper context, the Fourth Amendment and not the Fifth. The Court cited *Malloy v. Hogan* that the privilege is a fundamental trial right of criminal defendants and cited *Kastigar* that the violation occurs only at trial. *Verdugo*, 494 U.S. 259, 264. Those points were made only for purposes of explaining and illuminating the non-trial related policies and purposes of the Fourth Amendment and ought not be read as intending to limit the scope of the Fifth Amendment by holding that only use and never compulsion can constitute a violation. Such a holding was not necessary for deciding *Kastigar* and *Verdugo*. Moreover, it is imprecise and unrealistic to say that the violation occurs only at trial. The violation is a process that begins at the time of compulsion and culminates when the fruits of the compulsion are offered and received in evidence at the time of trial. Thus, neither the Fourth Amendment cases nor the immunity cases are useful guides for deciding when a violation occurs. It is plain that the *Murphy* court in discussing the policies and purposes of the privilege had not only use, but also compulsion, in mind as a violation. Compulsion without immunity, not use, invokes the "cruel trilemma."

The notion that the privilege applies only when the compelling sovereign and the using sovereign are both bound by the Fifth Amendment finds support in the "same sovereign" line of cases overruled in *Murphy*. The Fourth Circuit referred to those cases in reaching that conclusion. *Araneta*, 794 F.2d at 926. The government also refers to those cases when claiming that "a witness could not refuse to testify based on a fear of prosecution by a jurisdiction that was not bound by the Fifth Amendment." G. Br. 20.

That *United States v. Murdock*, 284 U.S. 141 (1931), was explicitly overruled in *Murphy* is clear, 378 U.S. at 57, where the Court said:

> Our review of the pertinent cases in this Court and of their English antecedents reveals that Murdock did not adequately consider the relevant authorities and has been significantly weakened by subsequent decision of this Court, and, further,

> that the legal premises underlying *Feldman [v. United States*, 322 U.S. 487 (1944)] and *Knapp* have since been rejected.

That *Knapp v. Schweitzer*, 357 U.S. 371 (1958), was overruled by the Court in *Murphy* is also clear. In *Murphy*, the Court reviewed *Knapp v. Schweitzer* and the "rule then in existence," on which *Knapp* was based, that "[t]he sole . . . purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." 378 U.S. at 77. The Court then announced: "The Court has today rejected that rule, and with it, all the earlier cases resting on that rule." 378 U.S. at 77. *Knapp v. Schweitzer* is clearly among those rejected. The Court further stated at 77, "We reject--as unsupported by history or policy--the deviation from [the correct] construction only recently adopted by this Court in *United States v. Murdock, supra,* and *Feldman v. United States, supra*."

The Court concluded that "the authorities relied on by the Court in *Hale v. Henkel*, 201 U.S. 43 (1906), provided no support for the conclusion that under the Fifth Amendment 'the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty.'" 378 U.S. at 69. Thus, the Court rejected the language which has formed the authority for the *Murdock* and *Knapp* decisions which are the basis of the Fourth Circuit's premise that "the Fifth Amendment privilege applies only where the sovereign compelling the testimony and sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination," (*Araneta*, 794 F.2d 920, 926).

The earlier overruled decisions which refused to protect witnesses from testifying based upon the fear that their testimony would be used against them in another sovereign's prosecution were decided on obsolete grounds. *Jack v. Kansas*, 199 U.S. 372 (1905), which was discussed in the *Murphy* opinions, is illustrative. There the Court held that a witness immunized under a state statute could not base his refusal to testify on a fear of federal prosecution for the reason that it presented "a danger so

unsubstantial and remote that it was not necessary (as it was impossible) for the statute to provide against it.. . . We do not believe in such case there is any real danger of federal prosecution." *Id.* at 382. Such rulings are not based on dispositive significance merely to the identity of the prosecuting authority. They were based on the more pragmatic premise that the risk of prosecution by federal authorities was in that era remote. Similarly, in earlier times the risk of a prosecution of a witness in the United States by a sovereign overseas was also remote due to the obstacles of geography and the absence of international judicial procedures. Those conditions no longer prevail.

The argument that the Fifth Amendment does not protect against all adverse uses of compelled testimony ignores the fact that foreign criminal prosecution is not just another adverse use, it is the criminal case that the language of the Fifth Amendment envisions. G. Br. 27-29. This is especially so where, unlike *Zicarelli v. New Jersey Comm'n of Investigation*, 406 U.S. 472 (1972), the government is investigating crimes perpetrated in foreign lands and has excellent reasons for stimulating foreign criminal prosecutions of the perpetrators. See *Gecas*, 120 F.3d at 1466 n.51, Gecas Pet. App. 111a, dissenting opinion of Judge Birch.

POINT II

LIMITING THE CLAUSE TO FEARS OF DOMESTIC PROSECUTIONS WOULD DEFEAT A LARGE MEASURE OF ITS POLICIES AND PURPOSES AS WELL AS CONSTITUTE A SIGNIFICANT SETBACK TO THE WORLDWIDE PROGRESS BEING MADE IN THE RECOGNITION OF HUMAN RIGHTS AND CIVIL LIBERTIES

The government is not trying to stop the misuse of an ancient shield. It seeks from this Court a modern weapon for fighting the crime that is rampant in the global village. G. Br. 35, n.12. The government seeks from this Court a decision that "opens the door for the use of our courts to compel the testimony of a United States citizen in the service of a foreign sovereign's

prosecution." Dissenting opinion of Judge Birch in *Gecas*, 120 F.3d at 1466, Gecas Pet. App. 151a. "Nowhere is cooperation more vital," U.S. President William J. Clinton declared in an address to the U.N. General Assembly, "than in fighting the increasingly interconnected groups that traffic in terror, organized crime, drug smuggling, and the spread of weapons of mass destruction."[2] Our government's domestic law enforcement activities abroad seem to be ever-expanding. As noted by Justice Brennan in his dissenting opinion in *United States v. Verdugo - Urguidez*, 494 U.S. 259, 279 (1990), "Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country." The Court of Appeals also noted the correlation between "cooperative internationalism" and the interest of the United States in foreign criminal prosecutions. Pet. App. 17a - 21a.

With this expansion of law enforcement activities beyond our borders will come ever-increasing demands that our Article III courts compel American tourists, traders and business people, as well as aliens under our jurisdiction, to testify about their activities and contacts while abroad. If need be, immunity from domestic prosecution will be granted and the testimony and its fruits will be exported to our foreign friends of the moment for such use as is then in vogue. Thus, more and more of our citizens and aliens within our jurisdiction will be subjected to the whipsaw effect feared in *Murphy* and faced with the cruel trilemma of self-accusation, perjury or contempt. *Murphy*, 378 U.S. at 55. Perhaps few tears would be shed if this trilemma could be limited to Nazi war criminals, Bosnian war criminals, Rwandan war criminals, Sadam Hussein's eager helpers and others of that ilk, but such limitation the government does not seek. The government seeks unfettered use of the compelled testimony and its fruits for

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[2] G. Br. 34. Remarks to the United Nations General Assembly in New York City, 31 Weekly Comp. Pres. Doc. 43 (Oct. 22, 1995); *cf.* David Johnston, *Strength Is Seen in a U.S. Export: Law Enforcement*, N.Y.TIMES, Apr. 17, 1995, at A1 ("international crime is increasingly being defined as a national security issue").

whatever foreign prosecution might in its unlimited discretion be deemed advantageous. G. Br. 23. The incentives as well as the opportunities for abuse are mind boggling.[3]

As expanding concepts of international law recognize the individual as a subject of international law, there has been a corresponding expansion of internationally recognized human rights, including the rights of the accused. While the right to remain silent has not yet achieved universal recognition and uniform application, the accelerating trend is definitely in that direction. *See* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context* at 62 - 84 (forthcoming in 45 UCLA L. Rev. June 1998).

It would be extremely incongruous if it came to pass that the laws and practices of other nations prohibited compulsion of testimony in their own courts while accepting compelled testimony and its fruits exported by the United States. Under the government's niggardly view, any plea that the using sovereign has laws and practices that parallel our Fifth Amendment would be dismissed as irrelevant because the foreign prosecution is not "any criminal case" and therefore the compulsion that takes place on our soil cannot possibly violate our Constitution because the violation takes place only at trial. Thus, even if the using sovereign is bound by something akin to the Fifth Amendment, the compulsion could proceed. Such a result obliterates the individual liberties rationale of *Murphy* and resurrects the "same sovereign" thinking that *Murphy* obliterated. As reciprocity between the federal and state governments within the United States contributed to the holding in *Murphy*, so should international reciprocity weigh in favor of recognizing the availability of the privilege in this case. *See* Amann, *supra*, at 98-101.

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[3] It is utterly absurd to declare, as the government does on page 22 of its brief, that "The potential for circumvention of the Self-Incrimination Clause that concerned the Court in *Murphy* does not exist when only the government compelling the testimony, and not the government using it, is bound by the Clause.", and at page 27: "The purpose of preventing abuses of power by the prosecution in the compulsion of incriminating testimony is fully served if the Fifth Amendment privilege is limited to persons at risk of domestic prosecution."

POINT III

THE CLAIMED IMPEDIMENT TO LAW ENFORCEMENT IS EXAGGERATED AND CANNOT BE BALANCED AGAINST THE PRIVILEGE IN ANY EVENT

A. IMPEDIMENT IS NEGLIGIBLE

The government raises concerns about impediment to law enforcement but fails to point to any studies or other hard evidence that shows the effect on law enforcement from the miniscule number of cases where a real and substantial fear of foreign criminal prosecution has been established. All that has ever been presented to any court are suppositions, speculations, dire predictions and similar self-serving opinions from the prosecutors about rogue governments, renegade states, widespread conspiracies and sinister cartels. A real and substantial harm to law enforcement has not been shown. The absence of substance has been supplanted by rhetoric and hypotheticals. The example given in *United States v. Lileikis*, 899 F. Supp. 802, at 807, n.9, overlooks the heavy burden. Pet. App. 45a - 46a. The government intones that this burden "is not a workable one" but fails to point out any instances where the claimed difficulties were insurmountable or of a different nature than in domestic prosecutions. G. Br. 36. Neither here nor in *Gecas* did the District Courts encounter any difficulties. Furthermore, such difficulties as may arise, inure to the benefit of the government since the claimant has the burden of proof. The claimant must prove the foreign law he fears. The claimant must show that his fear of foreign criminal prosecution under that law is real and substantial, and not merely theoretical or contrived. In addition, the claimant must show that he is likely to be delivered to the foreign land for prosecution. It is worthy of note that there have been very few claimants to the privilege and very few of them have ever sustained this burden. Pet. App. 29a - 31a. Even a successful claimant pays a heavy price to the government. He relinquishes his right to take the witness stand in his own defense. In civil proceedings the negative inference drawn from the

exercise of the privilege can doom the claimant. Pet. App. 32a - 33a. This inference may be worth more to the government than the compelled testimony.

Compulsion may be fruitless and even when it triumphs, the compelled testimony may also turn out to be worthless because the witness who expects to face a foreign firing squad will choose a nice comfortable American jail or lie rather than give truthful testimony against himself. Such a witness will harm our systemic concerns by either increasing our jail population or permeating our judicial proceedings with perjury. In this sense, denial rather than recognition of the privilege will impair law enforcement. Pet. App. 47a - 48a.

The government pretends that it does not have the means to enter into treaties or other binding arrangements whereunder immunity could be granted by foreign governments under "cooperative internationalism." The government's support for the views expressed in *United States v. Lileikis*, 899 F. Supp. 802 (D. Mass. 1995), G. Br. 35, ignores cases such as *In re Erato*, 2 F.3d 11 (2d Cir. 1993), where the privilege was supplanted by immunity granted by the foreign government. See also the alternatives to immunity statutes suggested by the Court of Appeals. Pet. App. 33a - 40a.

The instances where a witness has real and appreciable fear of foreign prosecution will more than likely predominantly involve crimes committed on foreign soil. Thus, domestic prosecution will not be unduly hindered because the questions to be asked the witness can be confined to domestic activities. *Zicarelli, supra.* Where that is not possible, it is part of the price we pay for our liberties. Pet. App. 31a.

The government also exaggerates when it imputes to the Framers intent that the privilege "be no broader than the government's power to grant immunity." G. Br. 31. Neither *Lefkowitz v. Turley*, 414 U.S. 70 (1973) nor *Pillsbury Co. v. Conboy*, 459 U.S. 248, 252 (1983), supports such a profound limitation on the outer boundaries of the privilege. In *Counselman v. Hitchcock*, 142 U.S. at 562, the Court said that the protection of

the privilege "is as broad as the mischief against which it seeks to guard." Rather, the immunity cases can be viewed as holding that the courts will not compel testimony unless immunity coextensive with the privilege is granted. *Kastigar*, 406 U.S. at 459. Thus, until immunity from foreign prosecution is secured, there ought not be any compulsion.

If the Framers had been presented with a realistic assessment of the magnitude of the harm to law enforcement rather than the exaggerated version, labeled an "absolute bar," G. Br. 31, it is difficult to imagine that it would have impelled the Framers to redraft the privilege to read "in any domestic criminal case."

B. BALANCING OF LAW ENFORCEMENT INTERESTS AGAINST INDIVIDUAL RIGHTS IS IMPERMISSIBLE

Despite this Court's observation in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) that "claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well," the government's exaggerated claims continue to fall on receptive ears. Fear of impeding law enforcement motivated the Fourth Circuit in *United States v. Under Seal (Araneta)*, 794 F.2d 920, 926 (4th Cir. 1986). The Tenth Circuit in *Parker, supra*, resorted to balancing when it denied the privilege, because the laws of some countries may be repugnant to our sense of justice. In *Lileikis*, the District Court adopted a test which can be summarized as "the privilege must yield if there is a need":

> If a governmental interest in enforcing the organic laws of the United States is involved, and the United States has a legitimate need for a witness's testimony in furthering that interest, its privilege must yield if the sole basis for claiming its protections is the fact that a resident of the United States faces the likelihood of a foreign prosecution. It would be an unacceptable affront to the sovereignty of the United States if the operation of its laws could be stymied by the desire of a foreign government to prosecute the same witness. 899 F.Supp. 802, 809.

The District Court in this case also voiced this fear in rather strong terms:

> [T]o allow Balsys to invoke the privilege would unreasonably impinge on the government's ability to monitor and verify immigration and visa applications.
>
> . . . . . .
>
> A contrary decision by this court would allow individuals attempting to immigrate to the United States to misrepresent their personal histories and other relevant information in order to gain access to this country, leaving the government without recourse and seriously eroding domestic law enforcement. 918 F. Supp. 588, at 599. Pet. App. 77a, 78a.

The District Court in this case not only ignored the individual's liberty interests,[4] but also engaged in an impermissible balancing process that the government wants this Court to adopt. This Court has emphatically rejected such balancing of interests. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

The balancing argument was also rejected in *In Re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972) at 1086:

> [A] constitutional privilege does not disappear, nor even lose its normal vitality, simply because its use may hinder law enforcement activities. That is a consequence of nearly all the protections of the Bill of Rights, and a consequence that was originally and ever since deemed justified by the need to protect individual rights.

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[4] Read literally, the District Court's opinion gives the government a windfall by compelling the resident alien to testify against himself in any criminal prosecution for visa fraud under INA 275(a)(3), 8 U.S.C. 1325(a)(3); perjury under 18 U.S.C. 1621 or making false statements under 18 U.S.C. 1001, which are subject to the five year statute of limitations in 18 U.S.C. 3282.

Thus, the District Court as well as the Fourth and the Tenth Circuit have degraded the privilege by balancing it against efficiency in law enforcement.[5] The privilege that "reflects many of our fundamental values and most noble aspirations" deserves more. *Murphy*, 378 U.S. at 55. See also *Moses v. Allard*, 131 B.R.W. 328, 351-353 (E.D. Mich. 1991), where the Fourth Circuit's decision in *United States v. Under Seal (Araneta)*, 794 F.2d 920 (4th Cir. 1986), *cert. den.*, 479 U.S. 924, 107 S.Ct. 331, 93 L.Ed. 2d 303, is analyzed and criticized.

Equally unpersuasive are the arguments advanced in *Araneta* and adopted in *Lileikis* as well as by the District Court, that our national sovereignty would be compromised if the government could not extract incriminating testimony from someone who fears foreign criminal prosecution. Neither the foreign government nor its laws infringe on our sovereignty. The Framers granted to the person the privilege not to be a witness against himself, so as to safeguard and preserve his dignity and individual liberty. The Framers did not grant to the government the right to force persons to incriminate themselves. The absence of the right to force incrimination without immunity may on occasion make law enforcement tasks more difficult, but that is what the Framers intended. This consequence flows from the Fifth Amendment, not from the laws or actions of any foreign power.

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[5] The Eleventh Circuit plurality in *Gecas*, 120 F.3d at 1434, Gecas Pet. App. 32a, declined to ground its decision on efficiency in law enforcement, but mentioned it nevertheless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated: March 27, 1998

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No. 97-873

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

ALOYZAS BALSYS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's essential contention (Resp. Br. 2-8) is that the role of the Self-Incrimination Clause in protecting individual privacy and dignity dictates that its coverage be extended to fears of prosecution in a foreign land. An examination of the constitutional text, past interpretations of the privilege, and the underlying purposes and law-enforcement interests at stake confirms, however, that the protection of the Self-Incrimination Clause is limited to fears of domestic prosecution.

A. Text, History, And Precedent Do Not Justify Extension Of The Self-Incrimination Clause To Fears Of Foreign Prosecution

1. Respondent and his amici argue that fears of foreign prosecution are necessarily embraced by the text of the Self-Incrimination Clause of the Fifth

Amendment, because the Clause refers to "any criminal case" rather than to "any *domestic* criminal case." National Association of Criminal Defense Lawyers (NACDL) *et al.* Amici Br. 3; Resp. Br. 8. The implication of that argument is that, in construing the Constitution, the default rule should be that words that might cover both foreign and domestic proceedings should be given such a universal (and extraterritorial) reading, unless the text specifically limits itself to proceedings in the United States. That novel approach reverses the general presumption that the Constitution does not have extraterritorial effect. See U.S. Br. 12-13. It also presupposes that the Framers drafted the Bill of Rights with both foreign and domestic proceedings in mind—a suggestion for which respondent and his amici offer no historical support.

In arguing that the term "any criminal case" in the Self-Incrimination Clause encompasses both domestic and foreign criminal cases, amici NACDL *et al.* rely (Amici Br. 5) on this Court's statement in *United States* v. *Gonzalez*, 117 S. Ct. 1032, 1035 (1997), that "the word 'any' has an expansive meaning." But the use of the word "any" in the Self-Incrimination Clause serves a more natural purpose than to sweep in criminal cases brought by foreign powers. The Fifth Amendment begins by requiring a grand jury indictment or presentment "for a capital, or otherwise infamous crime," thus limiting the requirement of an indictment to serious criminal cases. See *Mackin* v. *United States*, 117 U.S. 348 (1886); *Ex parte Wilson*, 114 U.S. 417 (1885). The Self-Incrimination Clause, in contrast to the Grand Jury Clause, is not so limited, as the phrase "any criminal case" makes clear. *McCarty* v. *Herdman*, 716 F.2d

361, 363 (6th Cir. 1983) ("[T]he language of the fifth amendment does not limit the privilege against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself."), aff'd *sub nom. Berkemer* v. *McCarty*, 468 U.S. 420 (1984). Neither the phrase "any criminal case," however, nor the textually similar reference to "all criminal prosecutions" in the Sixth Amendment, has any application beyond prosecutions brought in this country.

Respondent asserts (Resp. Br. 5) that "the Framers should have included the privilege in the Sixth Amendment" if they had intended the two to have the same application. We do not contend, however, that the rights provided by the Self-Incrimination Clause and the Sixth Amendment apply in precisely the same manner in the domestic context. The Sixth Amendment provides rights that a witness may assert only in his own criminal case. The Self-Incrimination Clause provides a right that may be asserted in any proceeding in which a witness would be compelled to give testimony that could incriminate him in a criminal case. U.S. Br. 14-15. Our point is that, in both instances, the criminal case must be a domestic one.

Respondent purports to find support for his position in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). See Resp. Br. 5. *Counselman* did not address respondent's suggestion that, even if "all criminal prosecutions" in the Sixth Amendment refers only to domestic proceedings, "any criminal case" in the Self-Incrimination Clause encompasses foreign proceedings as well. And, as we explained in our opening brief (U.S. Br. 13-15), the Court has abandoned the portion of the *Counselman* analysis on which

respondent relies. As the Court has since recognized, a grand jury witness may assert the privilege against compelled self-incrimination not because a grand jury proceeding is a "criminal case," as *Counselman* reasoned, but because the privilege may be asserted in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate [the witness] in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U.S. 70, 77 (1973).

2. Respondent does not take issue with our conclusion (U.S. Br. 16-17) that the Framers were not operating against any settled understanding that the common-law privilege against self-incrimination, as it had developed in England and the American colonies, would allow a witness to avoid testifying based on a fear of prosecution by an independent foreign government. Amici NACDL *et al.* argue (Amici Br. 8) that two pre-constitutional English cases (*East India Co.* v. *Campbell*, 1 Ves. Sen. 246, 27 Eng. Rep. 1010 (1749), and *Brownsword* v. *Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 (1750)) "support application of the privilege to bar compelled self-incrimination under foreign law." But amici do not dispute that both cases involve dual court systems operating under the same sovereign. See U.S. Br. 17. Nor do amici offer any reason to suspect that the Framers were even aware of those cases, much less sought to extend their holdings to witnesses who feared prosecution by a independent foreign government. Indeed, when two English courts in the mid-19th Century considered whether the common-law privilege extended to witnesses who feared foreign prosecution, neither cited *East India Company* or *Brownsword* as pertinent to the issue. See *King of the Two Sicilies* v. *Willcox*, 1 Sim. (N.S.) 301, 62 Eng. Rep. 116 (1851); *United States* v. *McRae*, L.R.-3 Ch. App. 79 (1867).

3. Respondent argues (Resp. Br. 6-7) that this Court's decisions in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), support the assertion of the privilege against compelled self-incrimination based on a fear of prosecution abroad. He relies principally on the fact that *Murphy* overruled prior decisions holding that a witness in a federal proceeding could not invoke the privilege based on a fear of state prosecution, and a witness in a state proceeding could not invoke the privilege based on a fear of federal prosecution, because the Fifth Amendment applied only when the federal government was *both* compelling *and* using a witness's self-incriminating testimony. See, *e.g.*, *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Feldman* v. *United States*, 322 U.S. 487, 489-494 (1944); *United States* v. *Murdock*, 284 U.S. 141 (1931); *Hale* v. *Henkel*, 201 U.S. 43, 69 (1906).

While respondent is correct in stating (Resp. Br. 6-8) that *Murphy* overruled those decisions, he is incorrect in implying that *Murphy* thereby requires the conclusion that the Self-Incrimination Clause is triggered by foreign criminal proceedings—which are brought by governments that are plainly not bound by the Fifth Amendment. In *Murphy* itself, the Court addressed only "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction." 378 U.S. at 53. The Court noted that there was an essential link between its rejection of the prior cases, which prohibited assertions of the privilege based on fears of

prosecution in another domestic jurisdiction, and its decision in *Malloy*, which applied the Self-Incrimination Clause to the States through the Fourteenth Amendment. The Court made clear that its decision was necessary to prevent a witness from being "whipsawed into incriminating himself under both state and federal law"—*i.e.*, being compelled to testify to federal crimes in state court and to state crimes in federal court—"even though the constitutional privilege against self-incrimination is applicable to each" as a result of *Malloy*. 378 U.S. at 55 (internal quotation marks omitted); see *id.* at 57 ("Our decision today in *Malloy* v. *Hogan*, *supra*, necessitates a reconsideration of [the single-sovereign] rule."); *Kastigar* v. *United States*, 406 U.S. 441, 456 n.42 (1972) (*Murphy*'s "[r]econsideration" of the single-sovereign rationale in the federal-state context "was made necessary by the decision in *Malloy*"). In contrast, when the United States seeks to compel a witness to give testimony that could incriminate him only in a prosecution brought by a foreign government, the Fifth Amendment privilege is not "applicable to each."[1]

Amici NACDL *et al.* argue (Amici Br. 19) that *Murphy* "made clear" that a Fifth Amendment violation occurs whenever a witness is compelled to give

[1] As we noted in our opening brief (U.S. Br. 22), the potential for "whipsawing" that concerned the Court in *Murphy* cannot exist in such circumstances, because the United States is not compelling the witness to give testimony that the Fifth Amendment would prevent the foreign government itself from compelling. Respondent rejects that point as "utterly absurd" (Resp. Br. 10 n.3), without confronting the difference between States, which are bound by the Fifth Amendment, and foreign governments, which are not.

self-incriminating testimony by a jurisdiction subject to the Fifth Amendment, "even if the potential using jurisdiction is not subject to the constitutional limitation." That question was not, however, presented in *Murphy*. To the contrary, the Court expressly declined to decide whether a violation of the Self-Incrimination Clause may occur at the "compulsion" stage as opposed to the "use" stage. See 378 U.S. at 57 n.6 ("Now that both [state and federal] governments are fully bound by the privilege, the conceptual difficulty of pinpointing the alleged violation of the privilege on 'compulsion' or 'use' need no longer concern us."). And, while the Fifth Amendment is doubtless aimed at preventing improper compulsion for the purpose of convicting a defendant in this country based on his own words, that does not mean that the compulsion alone works a violation; as the Court has observed, the privilege against compelled self-incrimination is "a fundamental trial right of criminal defendants" whose "violation occurs only at trial." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

Respondent also purports to find support in two pre-*Murphy* decisions of this Court: *United States* v. *Saline Bank*, 26 U.S. (1 Pet.) 100, 104 (1828), and *Ballmann* v. *Fagin*, 200 U.S. 186, 195-196 (1906). As we previously noted (U.S. Br. 18-19 & n.9), however, *Saline Bank* did not even mention the Self-Incrimination Clause. See 26 U.S. at 104. And in *Ballmann*, which involved a witness who was at risk of both federal and state prosecution, the Court recognized that the witness's fear of federal prosecution was sufficient, in itself, to support his assertion of the privilege. 200 U.S. at 195-196. Neither case contained any analysis of why the Clause, while not

(at that time) applicable to the States, might nonetheless be invoked by federal witnesses who feared state prosecution. See *Murphy*, 378 U.S. at 83-84 (Harlan, J., concurring) (discussing *Saline Bank* and *Ballmann*).

Respondent's amici, although not respondent himself, also rely (Amici Br. 17-18) on the English court's decision in *United States* v. *McRae*, *supra*. But amici do not explain why *McRae*, which involved the English common-law privilege, not the Fifth Amendment privilege, and which was issued some 75 years after the ratification of the Fifth Amendment, has any bearing on how the Fifth Amendment privilege should be construed. *McRae* is also distinguishable on its facts from this case. *McRae* was an attempt by a foreign government, the United States, to obtain evidence in an English court relevant to a pending prosecution in the United States. It was not a case in which England itself sought evidence from the witness in pursuance of its own law-enforcement interests. And, as we have previously noted (U.S. Br. 25-26), the English commentators did not read *McRae* as resolving the issue as definitively as amici suggest.[2]

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[2] The Court has not continued to embrace its earlier "observations" with respect to its precedents, once the Court has concluded that those observations were "mistaken." *E.g. Bennis* v. *Michigan*, 516 U.S. 442, 448-449 n.5 (1996). We submit that the *Murphy* Court's observations with respect to *Saline Bank*, *Ballmann*, and *McRae*—observations not essential to *Murphy*'s actual holding—were likewise mistaken for the reasons, among others, suggested by Justice Harlan in his concurring opinion in that case. See 378 U.S. at 81-82 n. 1, 83-84 (Harlan, J., concurring).

B. The Purposes Of The Self-Incrimination Clause Do Not Justify Its Extension To Fears Of Foreign Prosecution

1. Respondent relies (Resp. Br. 4) on what he considers to be the Self-Incrimination Clause's "predominan[t]" purpose of protecting "individual liberty." The Clause has been said to serve a variety of purposes. *Murphy*, 378 U.S. at 55. This Court has indicated, however, that the Clause was primarily designed to prevent "abuse [of] power" by the government, *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956), and particularly the abuses of "the ecclesiastical courts and the Star Chamber" with which the Framers were familiar, *Doe* v. *United States*, 487 U.S. 201, 212 (1988). Presumably, if the principal purpose of the Clause were, as respondent suggests, to protect such interests as "the inviolability of the human personality" and "the right of each individual to a private enclave where he may lead a private life" (Resp. Br. 4, quoting *Murphy*, 378 U.S. at 55 (internal quotation marks omitted)), an individual could never be compelled to disclose information implicating himself in a crime. But this Court has made clear that such compulsion is permissible in the domestic context once the individual has been granted use and derivative-use immunity. *Kastigar*, 406 U.S. at 459 (concluding that use and derivative-use immunity is consistent with "the purpose of the Fifth Amendment privilege").

We do not deny, as respondent asserts (Resp. Br. 4), that the Self-Incrimination Clause also serves to protect individual liberty. But the Clause has never been construed to bar all forms of compulsion that might be said to infringe that value. For example,

when the government compels a suspect to give a blood sample, a handwriting exemplar, or an authorization to a bank to produce records of any accounts that he may have, the suspect may be producing evidence that directly conflicts with his own liberty interests. Such "compelled" evidence may even serve as the essential means of convicting him, where incriminating evidence could not be obtained from any other source. The Court has recognized, however, that those acknowledged intrusions upon individual liberty do not violate the Clause. See, *e.g.*, *Doe*, 487 U.S. at 209-219 (bank authorizations not testimonial); *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967) (handwriting exemplars not testimonial); *Schmerber* v. *California*, 384 U.S. 757, 760-765 (1966) (blood sample not testimonial). It is equally appropriate to recognize that the values underlying the Self-Incrimination Clause, profound as they may be, find constitutional protection only where there is an actual or prospective "criminal case" as that phrase is used in the Bill of Rights, *i.e.*, a domestic criminal prosecution.

2. Respondent asserts (Resp. Br. 9-10) that applying the Self-Incrimination Clause only to witnesses who fear domestic prosecution will create "incentives" for government "abuse" that are "mind boggling." But respondent offers no basis in law or experience to suppose that the United States or a State would improperly "abuse" a witness in order to obtain testimony that neither could use against him in a criminal prosecution. Indeed, because the government's interest is generally that a domestic judge or jury credit the witness's compelled testimony (*e.g.*, in a criminal prosecution against other persons or in a deportation proceeding against the witness himself),

the government has every incentive to assure that the witness is treated properly, so as to avoid any suggestion that his testimony is the product of improper tactics. And, as the Court has elsewhere noted, the Constitution provides various "other protections," aside from the Self-Incrimination Clause, "to prevent abusive investigative techniques." *Doe*, 487 U.S. at 214; *id.* at n.13 (noting limitations imposed by the Due Process Clause).

Respondent further contends (Resp. Br. 10) that applying the Self-Incrimination Clause only to witnesses who fear domestic prosecution will produce the "incongruous" result that foreign governments that "prohibit[] compulsion of testimony in their own courts" could nonetheless "accept[] compelled testimony and its fruits exported by the United States." The short answer is that our Constitution is not concerned with whether, or to what extent, other governments apply a privilege against self-incrimination in their own courts. See, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950); *Neely* v. *Henkel*, 180 U.S. 109, 122 (1901).[3]

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[3] It is questionable whether many governments would allow a witness in respondent's current position to assert a privilege against self-incrimination. As we previously observed (U.S. Br. 25-26), Great Britain allows the privilege to be asserted only by a witness who fears domestic prosecution. Under the Canadian Charter of Rights and Freedoms, only a criminal defendant cannot be compelled to testify. Any other person may be compelled to give self-incriminating testimony, although such testimony cannot be used against him in a later criminal prosecution. Canadian Charter of Rights and Freedoms, Pt. I, §§ 11(c), 13; Canada Evidence Act, R.S.C., ch. C-5, § 5 (1985). India similarly allows its privilege against self-incrimination to be asserted only by an individual who has been formally charged with a crime. Indian Const., Art. 20(3). In a number of other

C. The Extension Of The Privilege To Fears Of Foreign Prosecution Would Damage Domestic Law Enforcement

1. Respondent attempts (Resp. Br. 11-13) to minimize the harms to domestic law enforcement that would flow from extending the Fifth Amendment privilege to witnesses who fear foreign prosecution. It is not surprising, however, that the government has not accumulated the "hard evidence" that respondent demands (*id.* at 11) of the impact of such a construction of the Self-Incrimination Clause. No circuit had adopted that construction before this case. And, as we previously explained (U.S. Br. 34), international criminal activity, ranging from drug trafficking to white-collar crimes to political terrorism, is an ever-growing threat to the United States and the world community. The United States would be increasingly impeded in its law-enforcement efforts in the years ahead if individuals could avoid

countries, the privilege against self-incrimination appears to be available only to the accused in his own criminal prosecution. Even then the privilege is often not invoked for various reasons not applicable in the United States, including that the judge or jury may be allowed to draw adverse inferences from the accused's silence. See Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361, 378-382 (1977); Jeffrey K. Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y.L. Sch. J. Int'l & Comp. L. 1, 19-24 (1993); Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 U.C.L.A. L. Rev. (forthcoming 1998) (manuscript at 74-75, lodged with the Court by respondent). Other countries recognize no such privilege at all. See Amann, *supra* (manuscript at 102-103).

testifying about such crimes in this country based on a fear of prosecution abroad.[4]

Respondent contends (Resp. Br. 11) that few individuals will be able to assert the privilege successfully given the "heavy burden" of demonstrating a real and substantial fear of prosecution by a foreign government. But this case and *United States* v. *Gecas*, 120 F.3d 1419 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, suggest that the burden often is not particularly heavy. See *United States* v. *Gecas*, 830 F. Supp. 1403, 1407 (N.D. Fla. 1993) (observing that "the witness's burden is minimal"). The district courts in both cases found that the defendants faced a real and substantial fear of prosecution by Lithuania and Israel (and, in *Gecas*, Germany) notwithstanding all of the following: First, as

[4] The Court need look no further than this case, and *United States* v. *Gecas*, 120 F.3d 1419 (11th Cir. 1997) (en banc), petition for cert. pending, No. 97-884, for an illustration of the potential impact on domestic law enforcement of extending the Fifth Amendment privilege to witnesses who fear foreign prosecution. The government possesses certain documentary evidence indicating that respondent and Mr. Gecas assisted in the Nazi persecution of Lithuanian Jews and other civilians. But the government believes that it may not at this time have sufficient evidence, without these individuals' own testimony, to establish that they are deportable under the requisite "clear and convincing" standard. 8 U.S.C. 1229a(c)(3)(A) (Supp. II 1996). And that is so even if, as the court below suggested (Pet. App. 32a), adverse inferences may be drawn from their silence. The United States may thus have to tolerate the continued presence of these individuals (and many others) within its borders—notwithstanding Congress's clear intent that "participants in Nazi persecutions or genocide" be removed from the country, see 8 U.S.C. 1182(a) (3)(E), 1227(a)(4)(D) (Supp. II 1996)—if those individuals cannot be compelled to testify about their activities during World War II.

the courts acknowledged, neither Lithuania nor Israel had expressed any interest in prosecuting either defendant. Pet. App. 59a; *Gecas*, 830 F. Supp. at 1411 n.5. Indeed, Lithuania had not initiated any prosecution for World War II war crimes during the post-Soviet era,[5] and Israel had prosecuted only two individuals for World War II war crimes in its entire history, *Gecas*, 830 F. Supp. at 1408 n.3. Second, given that the defendants had refused to answer any questions about their World War II activities on Fifth Amendment grounds, the courts simply accepted the defendants' assertions that their testimony would implicate them in war crimes. See *Gecas*, 830 F. Supp. at 1407 (stating that "[i]n putting the witness to his burden [of proving a real and substantial fear of prosecution], the court must be careful not to force the witness to surrender the very protection which the privilege is designed to guarantee"). The courts were in no position to assess whether the defendants' activities did, in fact, constitute war crimes or, if so, whether the crimes were ones to which Lithuania or Israel would choose to devote its prosecutorial resources. See Pet. App. 59a-65a; *Gecas*, 830 F. Supp. at 1408-1410. Finally, as the courts recognized, the United States was not required to deport either

[5] Lithuania has since indicted the former chief and deputy chief of the Lithuanian Security Police, known as the "Saugumas," in Vilnius, which persecuted Jews and other civilians in collaboration with the Nazi occupation forces. Lithuania has not prosecuted other suspected Nazi collaborators, including members of the Saugumas, who are currently living in that country. See Richard C. Paddock, *Vilnius Turns Blind Eye to Its Nazi Past*, L.A. Times, Jan. 4, 1998, at A1. The United States believes that respondent was a member, although not a leader, of the Vilnius unit of the Saugumas.

defendant to Lithuania or Israel. If the defendants were deported, they would have a right to choose the country to which they were sent, although the Attorney General could veto that choice as "prejudicial to the United States" or the country could refuse to accept them. 8 U.S.C. 1231(b)(2)(A), (C) (Supp. II 1996); see Pet. App. 69a-70a; *Gecas*, 830 F. Supp. at 1410-1411.

Respondent also speculates (Resp. Br. 12) that compelling testimony from a witness who fears foreign prosecution "may be fruitless" because the witness may choose to lie or remain silent, thereby risking sanctions for perjury or contempt, rather than to testify truthfully. But a witness also has such incentives in the domestic context when his truthful testimony would subject him to adverse consequences other than a criminal prosecution. See, *e.g.*, *Piemonte* v. *United States*, 367 U.S. 556, 559 n.2 (1961) (witness may be compelled to testify notwithstanding fears of retaliation against himself and his family). The government has found the testimony of such witnesses to be sufficiently fruitful to pursue. Cf. *United States* v. *Grayson*, 438 U.S. 41, 50-52 (1978) (recognizing that even false testimony may have probative value).

Respondent suggests (Resp. Br. 12) that the United States' interests may be adequately served in many cases by questioning the witness only about his "domestic activities." Cf. J.A. 33-35 (respondent invokes privilege with regard to his domestic activities). But the foreign and domestic aspects of international criminal schemes are often inextricably intertwined. And respondent provides no solution for cases, such as this one, in which the United States'

interest is in removing an individual from this country precisely because of his conduct abroad.

2. Finally, respondent contends (Resp. Br. 13) that the government is improperly asking the Court to "balanc[e] * * * law enforcement interests against individual rights." That is not the case. Our submission is that the Self-Incrimination Clause, interpreted in light of its text, historical context, and principal purpose, protects witnesses only when the prosecution that they fear would be brought by the United States or a State. It is relevant to that inquiry whether the Framers contemplated that the Self-Incrimination Clause would operate as an absolute bar to the government's obtaining evidence needed for effective law enforcement. It was settled at the time of the drafting of the Self-Incrimination Clause that the government could overcome a witness's assertion of the privilege against compelled self-incrimination by a grant of statutory immunity. *Kastigar*, 406 U.S. at 445 & n.13. It reasonably follows that the Framers intended that the Clause be no broader than the government's power to grant immunity. As the Court has observed, statutory use and derivative use immunity protects the Fifth Amendment rights of witnesses at risk of domestic prosecution because it is "coextensive with the scope of the privilege." *Id.* at 449.

In *Murphy*, the Court recognized that permitting a federal witness to invoke the privilege based on a fear of state prosecution could not "prevent a proper federal investigation" because "the Federal Government could, under the Supremacy Clause, grant immunity from state prosecution." 378 U.S. at 71. Likewise, the Court in *Murphy* adopted an exclusionary rule in federal cases where a State has compelled

testimony under a grant of immunity in order to "permit[] the States to secure information necessary for effective law enforcement." *Id.* at 79. No such accommodation is possible if witnesses may assert the privilege based on fears of prosecution by a foreign government.[6] Rather, permitting a witness to invoke the privilege based on a fear of foreign prosecution would "prevent a proper federal investigation" because the federal government cannot grant immunity from the use or derivative use of testimony in a foreign prosecution.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998

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[6] Respondent argues (Resp. Br. 12) that, in *In re Erato*, 2 F.3d 11 (2d Cir. 1993), the privilege was "supplanted by immunity granted by the foreign government." *Erato* did not so hold. It held only that, because a foreign government had granted immunity to a witness, the court did not have to decide whether such immunity was a prerequisite to an order compelling testimony under 18 U.S.C. 6002. 2 F.3d at 14 n.2. In any event, our essential point is that it is not within the power of the United States to *require* a foreign government to grant "immunity"; nor would any such commitment be enforceable by the United States if the foreign government elected to use such immunized testimony in a prosecution in its own courts.

No. 97-873

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES,

Petitioner,

-vs-

ALOYZAS BALSYS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF WORLD JEWISH CONGRESS AND HOLOCAUST SURVIVORS AND FRIENDS IN PURSUIT OF JUSTICE, INC. AS AMICI CURIAE TO FILE THEIR BRIEF OUT OF TIME

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Amici World Jewish Congress and Holocaust Survivors and Friends in Pursuit of Justice, Inc. move this Court for an order allowing them to file their brief *amici curiae* out of time:

1. The issue in this case is whether Aloyzas Balsys, an alleged Nazi war criminal, may invoke the Fifth Amendment right against self-incrimination based on his fear of a foreign prosecution. Balsys has refused to testify at a deposition convened pursuant to an administrative subpoena, at which the Government intended to question him regarding his activities during World War II. The purpose of such questioning would be to ascertain whether Balsys had obtained his permanent resident status in this country fraudulently. Balsys purportedly fears that his answers at such a deposition could be used

against him in a criminal prosecution in Lithuania, where he allegedly served as a member of the Nazi-controlled Lithuanian Security Police, Israel or Germany.

2. *Amici* are Jewish organizations whose purpose includes combating anti-Semitism. They have a legitimate interest in ensuring that the Fifth Amendment is not improperly utilized to allow Nazi war criminals to remain in this country in violation of the immigration law.

3. *Amici* sought and received permission from both the Solicitor General's Office and from respondent's counsel to file a brief *amici curiae* in support of the Government. Pursuant to such permission, *amici* served and filed their brief in accordance with Rule 29.2 and 29.3 of the Supreme Court Rules, by mailing 3 copies to each party and 40 copies (with proof of service) to the Court on February 27, 1998, the date on which the Government's brief in this case was due. Prior to filing the brief by this method, Sanford Hausler, one of *amici's* counsel, telephoned the Supreme Court Clerk's Office to ascertain if mailing the briefs to the Court on the date that they were due constituted timely filing. The Court employee who took his call assured him that filing in that manner was proper.[1]

4. *Amici's* counsel received a telephone from Cathy Tycz of the Supreme Court Clerk's Office on March 3, 1998. She informed counsel that in its order granting certiorari, the Court had provided that Rule 29.2 was not applicable in this case. As the briefs were not received in the Clerk's Office by 3:00 p.m. on February 27, 1998, they were technically untimely.

5. *Amici* and their counsel were unaware of that provision of the order. Although their counsel conferred with the Solicitor General's Office, no one from that office informed

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[1] Hausler's conversation with the clerk was general in nature and did not relate specifically to the *Balsys* case.

them of the special requirements relating to filing contained in the order granting certiorari. The notation that certiorari was granted, found in United States Law Week at 66 U.S.L.W. 3467, does not say anything about the inapplicability of Rule 29.2.

6. As *amici* served respondent by mail on February 27, 1998, and as respondent would, in the normal course, receive the three copies of the brief on the next business day, there is little chance that respondent would, in any way, be prejudiced were this Court to accept *amici's* brief for filing out of time.

7. *Amici*'s brief contains analysis that they believe will assist the Court in its resolution of this case. The arguments contained therein are not made in the Government's brief.

WHEREFORE, *amici* respectfully request that this Court allow their brief to be filed out of time.

Dated: March 5, 1998

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QUESTIONS PRESENTED

1. Has Balsys, who made voluntary statements under oath in a visa application in order to enter the United States and obtain the benefit of permanent resident status and later refused to answer questions relating to those very statements because he fears that his testimony might incriminate him in a foreign prosecution, (a) forfeited his right to remain silent or (b) if he has not, may he, if he chooses to remain silent, be required to relinquish the benefit that he secured by his prior statements?

2. Is Balsys, who has asserted that his testimony at a deposition could be used against him at a subsequent foreign prosecution, be adequately protected from self-incrimination if a sealing order that would prevent the foreign government from obtaining his testimony is issued?

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Amici World Jewish Congress and Holocaust Survivors and Friends in Pursuit of Justice, Inc., on consent of the parties, submit this brief *amici curiae* in support of the Government.[1]

INTEREST OF AMICI

Amici are Jewish organizations whose purpose includes combating anti-Semitism. They are concerned with bringing

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[1] No party other than *amici* and their counsel have paid any expenses relating to this brief. This brief was written solely by *amici's* counsel.

to justice those who persecuted Jews and others during the Nazi era. They believe that the Second Circuit's decision in *Balsys* would transform our Constitution's Fifth Amendment from its historic role as a shield for basic human rights into a sword for protecting perpetrators of mass murder who entered this country illegally. The Second Circuit's holding, if allowed to stand, would reward Nazi war criminals who lied when they voluntarily completed their visa applications for entry into the United States, belittle the strong interest that the Government has in ensuring that such war criminals do not find a haven in this country and do nothing to advance the purposes of the Fifth Amendment.

Amici believe that it is not necessary for this Court to reach the constitutional question of whether the Fifth Amendment protects against the fear of self-incrimination involving foreign prosecutions because this case can be decided on other, nonconstitutional grounds. *Amici* would like to advance certain additional arguments not found in the Government's brief respecting those grounds. First, *amici* contend that respondent Aloyzas Balsys, by voluntarily making sworn statements in his visa application relating to his wartime activities and receiving a continuing benefit from such statements — entry into the United States and permanent resident status here — (1) has forfeited his right to object to further questioning about those wartime activities or (2) if he nonetheless chooses to remain silent, has forfeited the benefits of his initial answers, *i.e.*, his permanent resident status. Second, *amici* suggest that both the Government's interest in obtaining Balsys's testimony and Balsys's interest in avoiding self-incrimination can be accommodated by the issuance of an appropriate sealing order.[2]

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[2] *Amici* also take sharp issue with statements made by Judge Meskill in his concurring opinion below to the extent that they could be construed as supporting broader Fifth Amendment rights for Nazi war criminals than other individuals. *United States v. Balsys,* 119 F.3d 122, 143 (2d Cir. 1997) (concurring, Meskill, J.), *cert. granted,* 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998). It would be anomalous, indeed, if those accused of participation in the Holocaust had more protections than the perpetrators of less heinous crimes.

Amici believe that their discussion of the foregoing issues will assist the Court in its resolution of this case.

STATEMENT OF FACTS

Respondent Aloyzas Balsys is a Lithuanian national, living in the United States since 1961. Although Balsys stated, under oath, in his visa application that he had served in the Lithuanian army from 1934 to 1940 and had been "in hiding" from 1940 to 1944, the Government suspects that he persecuted Jews and others as a member of the Lithuanian Security Police during World War II. If the Government's suspicions are correct, Balsys would be deportable under United States law.

To ascertain his actual activities during the relevant period, the Government issued an administrative subpoena, pursuant to 8 U.S.C. § 1225, requiring Balsys to appear at a deposition and answer questions. Balsys, however, refused to answer any questions other than providing his name and current address, asserting the Fifth Amendment right against self-incrimination. Balsys concedes that he does not fear criminal prosecution in the United States. He invoked the privilege solely based on his belief that he could be prosecuted in Lithuania, Israel or Germany and that his testimony in the United States could be used against him in any such prosecution.

The Government commenced an action in the United States District Court for the Eastern District of New York, seeking an order to compel Balsys to comply with the subpoena. The District Court found for the Government,

holding that (1) the Fifth Amendment privilege did not extend to foreign prosecutions and (2) Balsys had waived the privilege by completing the visa application. *United States v. Balsys*, 918 F. Supp. 588 (E.D.N.Y. 1996). Balsys appealed.

The Second Circuit reversed, holding that the Fifth Amendment was applicable and that Balsys had not waived his rights. *United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997). Rehearing and rehearing *en banc* were sought and denied.

The Government petitioned for certiorari, asking this Court to consider the question of whether the Fifth Amendment precluded self-incrimination where the prosecution feared by the witness was foreign, rather than domestic. This Court granted certiorari on January 20, 1998. *United States v. Balsys,* 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998).

SUMMARY OF ARGUMENT

Balsys made voluntary statements under oath on his visa application about his activities during World War II. As a result of those statements, he obtained permanent resident status in this country. Now he refuses to answer questions relating to the same subject matter, claiming that his testimony could incriminate him in a foreign country.

The precedents of this Court and of several courts of appeals show that an individual may not use the Fifth Amendment as a sword. Having put a favorable view of the facts into the record in order to secure a benefit, that person may not refuse to answer questions about those facts and continue to enjoy the benefit. The individual must either answer the questions or relinquish the benefit.

Balsys's purported Fifth Amendment right against self-incrimination can adequately be protected by the issuance of an appropriate sealing order.

ARGUMENT

I. BALSYS CANNOT BOTH RETAIN THE CONTINUING BENEFIT HE SECURED THROUGH THE VOLUNTARY, SWORN STATEMENTS HE MADE IN HIS VISA APPLICATION AND TO REFUSE TO ANSWER QUESTIONS RELATING TO THE SUBJECT MATTER OF THOSE STATEMENTS

Balsys's position in this case has been that he should be allowed to retain the continuing benefit of permanent resident status—which he obtained by virtue of his voluntary, sworn statement about his wartime activities—while at the same time refusing to answer questions about those activities that have been posed to determine his eligibility for this benefit. The Fifth Amendment does not allow Balsys to remain silent and to reap these rewards.

In this case, the Court need not reach the constitutional question of whether the threat of foreign prosecution triggers rights under the Fifth Amendment[3] because Balsys's statements in his visa application, made voluntarily and under oath, constitute a forfeiture or waiver of any such rights.[4]

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[3] As a general rule, this Court will not decide a constitutional question in a case when there exists a nonconstitutional basis on which the case can be decided. *Clinton v. Jones*, 117 S. Ct. 1636, 1642 & n.11 (1997); *United States v. National Treasury Employees Union*, 513 U.S. 454, 478 (1995).

[4] The Second Circuit's rejection of the Governments waiver argument is based on the mistaken belief that the visa application and the issuance of the administrative subpoena constituted two separate proceedings because of the time that has elapsed between them and the recent enactment of a statute by Lithuania retroactively criminalizing war crimes committed during World War II. First, as 8 U.S.C. §1225 makes

It is incontrovertible that Fifth Amendment rights, including the right against self-incrimination, may be waived. *Rogers v. United States*, 340 U.S. 367, 373 (1950); *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (Hand, J.), *cert. dismissed*, 319 U.S. 41 (1943).[5] A waiver may be effected by a voluntary statement of fact made under oath by an individual. Such a statement bars the individual from asserting the Fifth Amendment when subsequently questioned regarding the same subject. The rationale of this rule is clear. If the declarant is permitted to refuse to answer subsequent questions relating to the same subject matter, he or she could

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clear, the deposition is not a proceeding, but rather is part of the Government's continuing duty to ensure that visas are only given to those individuals meeting the statutory criteria. Further, the concern underlying the "separate proceedings" rule—a rule that has never been adopted by this Court—is that because of the time that has elapsed between the two proceedings, a new event might cause a new apprehension of prosecution in the witness. The new statute, however, provides no new basis for apprehension. The Soviet Union, of which Lithuania was a part, has prosecuted war criminals since the 1940s in its domestic courts. *See Linnas v. INS*, 790 F.2d 1024, 1030 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986); Taylor, *Nuremberg Trials*, 1949 Int'l Conciliation 241, 255. The Second Circuit also suggested that Balsys could not have waived his Fifth Amendment rights because when he applied for admission to the United States he had no constitutional rights to waive. However by making statements to secure the benefit of permanent resident status and by entering the United States, Balsys has forfeited the right to refrain from answering questions relating to his entitlement to the benefit. If he refuses to answer the questions put by the Government, then he cannot continue to enjoy the benefit. As shown herein, this Court has not looked favorably on a party trying to use the privilege offensively, rather than defensively.

[5] Indeed, this Court has even held that "an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976); *accord United States v. Balsys*, 119 F.2d 122, 139 (2d Cir. 1997), *cert. granted*, 66 U.S.L.W. 3467 (U.S. Jan. 20, 1998); *cf. Schneckloth v. Bustamonte*, 412 U.S. 218, 222-27 (1973).

manipulate the truth, putting forward his or her sworn version of the facts while denying the Government (or other opposing party) an opportunity to place before the Court or other adjudicative body further clarifying information that can only be obtained from the declarant.

While this issue has never been decided by this Court in this precise procedural posture, it has arisen in the context of witnesses who decline to answer questions, on Fifth Amendment grounds, during cross-examination. As Justice Frankfurter stated in *Brown v. United States*, 356 U.S. 148, 155-56 (1958):

> [A witness] cannot reasonably claim that the Fifth Amendment gives him not only this choice [of whether to testify] but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. *It would make of the Fifth Amendment* not only a humane safeguard against judicially coerced self-disclosure but *a positive invitation to mutilate the truth a party offers to tell.* (Emphasis added)

See also Fitzpatrick v. United States, 178 U.S. 304, 315 (1900); *Brown v. Walker*, 161 U.S. 591, 597-98 (1896); *United States v. Conte*, 99 F.3d 60, 66 (2d Cir. 1996).

Similarly, Circuit Judge Learned Hand stated:

> It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, *it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition.*

St. Pierre, 132 F.2d at 840 (emphasis added).

This rule has been applied not only in cases involving cross-examination, but also in cases implicating analogous interests. In *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991) (Posner, J.), the defendants made voluntary statements in a non-coercive, non-custodial setting to an IRS agent. Those statements (including their refusal to answer certain questions) were admitted into evidence in a criminal proceeding to prove the intent of a crime. Recognizing that this case involved a procedural posture somewhat different from that in the *Brown* line of cases, the Seventh Circuit nonetheless held:

> But the underlying principle could be thought the same [as in *Brown*]. The privilege against self-incrimination is not a privilege to attempt to gain an advantage . . . by selective disclosure followed by a clamming up. Having voluntarily given the agent their version of the events, the Davenports forfeited their privilege not to answer questions concerning that version.

Id. at 1174-75.

The same "underlying principle" referenced by Judge Posner is at stake here: Balsys cannot voluntarily testify about his wartime activities under oath in order to gain the government-provided benefit of admittance into this country and then "clam up" about that testimony when the truthful version might result in the loss of the benefit. Indeed, the *Davenport* Court held that where a party is "seeking an advantage by selective disclosure," a waiver of the Fifth Amendment right should be found.[6] *Id.* at 1175.

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[6] In *Davenport*, the advantage of the disclosure was "to get the Internal Revenue Service to end its investigation." 929 F.2d at 1175. In this case, Balsys, in disclosing that he was "in hiding" during World War II, secured the advantage of ending further government inquiry into his

A number of circuit courts have held that when a party seeks to "mutilate" or "garble" the truth in the manner decried by Justice Frankfurter in *Brown* and by Judge Hand in *St. Pierre* the party must give up the benefit obtained through the voluntary statements made. In *Edmond v. Consumer Protection Div., Office of the Attorney General of the State of Maryland* (*In re Edmond*), 934 F.2d 1304 (4th Cir. 1991), for example, Edmond, a debtor in bankruptcy, sought summary judgment, submitting an affidavit in support of his motion. He then refused to be deposed, asserting his right against self-incrimination. The bankruptcy court held that the debtor had waived this right by submitting his affidavit. Because the debtor refused to be deposed, the court struck the affidavit and denied the motion. On appeal, the Fourth Circuit affirmed, applying the reasoning of *Brown*:

> The same principle applies when a party seeks to invoke the Fifth Amendment to avoid discovery while offering an affidavit to compel a certain result on summary judgment. An affidavit operates like other testimonial statements to raise the possibility that the witness has waived the Fifth Amendment privilege.

Id. at 1308; *see also United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990); *Wehling v. CBS*, 608 F.2d 1084 (5th Cir. 1979) (Court refused to allow plaintiff to continue litigation where he claimed the Fifth Amendment and refused to provide defendant with evidence relevant to its defense, in effect using the privilege as a sword.); *cf. United States v. Linnas*, 527 F. Supp. 426, 429 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982) (where accused Nazi war criminal refused to answer interrogatories

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wartime activities, leading to his gaining permanent resident status.

based on Fifth Amendment privilege, all facts pertaining to unanswered interrogatories were deemed admitted).

The rule set out in this line of cases adequately balances the individual's constitutional right against the opposing party's interests. The party asserting the privilege is not required to testify, but cannot take advantage of his or her prior statements.

Under the precedents, Balsys has a choice. He can either submit to questioning regarding his continued eligibility to receive a government benefit (permanent resident status) or give up that benefit. If the rule of *Brown* and its progeny is not applied in cases such as this, parties ineligible for admission to this country would be invited to "mutilate the truth," secure in the knowledge that Government will be severely hampered in its efforts to uncover the truth and to seek their removal through appropriate means from the United States. Balsys, for example, will be able to continue to enjoy the benefits of his sworn version of the facts relating to his wartime activities — permanent residency in the United States — while avoiding questions relating to that version. The ability to retain a benefit by remaining silent after obtaining that benefit through voluntary sworn statements is not the sort of interest the Fifth Amendment was designed to protect.

II. THE INTERESTS OF BOTH THE GOVERNMENT AND BALSYS CAN BE ACCOMMODATED BY PLACING HIS TESTIMONY UNDER SEAL

Although the Government's interest in compelling Balsys's testimony and Balsys's claim to Fifth Amendment rights are at odds, both can be accommodated by the issuance of a comprehensive and restrictive sealing order. Such an order, which is authorized by Rule 26(c)(6) of the Federal Rules of Civil Procedure, would allow the Government to take Balsys's deposition, but could preclude such testimony from being released to a foreign government or anyone else.

While this issue has never been addressed by this Court, several circuits that have considered it have favored the approach advanced by *amici*. Directly on point is *United States v. Juodis*, 800 F.2d 159 (7th Cir.), *stay granted sub nom. Mikutaitus v. United States*, 478 U.S. 1306 (Stevens, Circuit Justice), *stay vacated*, 479 U.S. 911 (1986). There, Mecislovas Mikutaitus, a naturalized citizen of Lithuanian descent, refused to appear for a deposition in a denaturalization proceeding involving another Lithuanian national who was believed to have committed war crimes in Lithuania during World War II as part of the Nazi-controlled Lithuanian Auxiliary Police. Mikutaitus claimed that the evidence adduced could be used against him in a subsequent criminal trial in the Soviet Union and that an order sealing his deposition would be inadequate to protect his Fifth Amendment right against self-incrimination. On appeal, the Seventh Circuit affirmed the District Court's order requiring Mikutaitus to appear at his deposition, stating:

> Mikutaitus has presented no evidence that establishes that the district court lacks the ability to effectively limit access to the deposition or that one of the parties, namely the OSI, is under some form of pressure to ignore the court's order and share the information with the Soviets. While the "parade of horribles" presented by Mikutaitus concerning the possible effect of his testimony may in fact turn out to be true, he has failed to establish any *factual basis* for questioning the efficacy of the accommodation of his rights provided by the district court. A real and substantial fear of foreign prosecution cannot be based on pure supposition concerning the ability of a foreign power to overcome a court order designed to prevent the foreign power from obtaining the information.

Id. at 163. Other circuits have also taken this approach. *See, e.g., In re Application of President's Comm'n on Organized Crime*, 763 F.2d 1191, 1199 (11th Cir. 1985); *In re Baird*, 668 F.2d 432, 434 (8th Cir. 1982) (immunized witness can be forced to testify before grand jury despite possibility of foreign prosecution because of grand jury secrecy rules); *In re Weir*, 495 F.2d 879, 881 (9th Cir.), *cert. denied*, 419 U.S. 1038 (1974) (same).

While some courts have refused to force an immunized witness to testify before a grand jury because of the witness's fear of a foreign prosecution, a situation somewhat analogous to that at bar, such holdings are grounded in the belief that grand juries are not "leakproof." *See, e.g., In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 123 (2d Cir. 1982); *United States v. (Under Seal)*, 794 F.2d 920, 925 (4th Cir.), *cert. denied sub nom. Araneta v. United States*, 479 U.S. 924 (1986). Leaks from a deposition—at which attendance may be limited to the witness and officers of the court—are less likely than leaks from a grand jury. *President's Comm'n*, 763 F.2d at 1199. And the District Court can customize the sealing order to further reduce the risk of disclosure.[7]

A comprehensive sealing order that requires all copies of transcripts of the deposition and all material derived therefrom to be deposited with the Court will ensure that Balsys's testimony cannot be used against him. Balsys would not be relying solely on the good faith of law enforcement officials to protect his interests, but that of the court.

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[7] The solution suggested by the Second Circuit—that Congress enact legislation barring deportation to a country in which prosecution is likely—cannot be effectuated in time for the resolution of this case and is unworkable in any event. There would be no way of assuring that the country initially accepting the declarant might not at a later date extradite or deport the declarant to the prosecuting country.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Second Circuit.

Dated: February 27, 1998

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(8)

No. 97-873

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

ALOYZAS BALSYS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a witness may invoke the Fifth Amendment privilege against self-incrimination based solely on a fear of prosecution by a foreign country?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This *amicus curiae* brief is submitted in support of the position of the Respondent Aloyzas Balsys. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1/]

[1/] As required by Rule 37.6 of this Court, *amici curiae* submit the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of almost 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice. The NACDL considers the Fifth Amendment privilege against self-incrimination a critical part of that system.

The NACDL submits this brief because it shares this Court's conviction that the privilege against self-incrimination "registers an important advance in the development of our liberty--'one of the great landmarks in man's struggle to make himself civilized.'" *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (quoting E. Griswold, *The Fifth Amendment Today* 7 (1955)). The NACDL is committed to preserving that "landmark" of our liberty.

The New York Council of Defense Lawyers is an organization of more than 170 members of the criminal defense bar in the New York area who practice in the federal courts on a regular basis. It was formed several years ago to address, on an institutional level, issues confronting defense lawyers in criminal cases. In fulfilling that role, the Council has appeared as *amicus curiae* before the United States Court of Appeals for the Second Circuit, as well as state appellate courts and federal

and state trial courts in numerous cases that have posed issues which are important to the criminal defense bar.

SUMMARY OF ARGUMENT

1. The Fifth Amendment self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The constitutional text makes no distinction between domestic and foreign criminal cases. According to its plain terms, the Self-Incrimination Clause bars the government from compelling a person to be a witness against himself in "any criminal case," not merely--as the government would have it--in any *domestic* criminal case.

2. The policies that the privilege promotes confirm that the Self-Incrimination Clause should be interpreted according to its plain language. At its heart, the privilege secures individual liberty. It bars the government from subjecting a witness to the "cruel trilemma" of contempt, perjury, and self-incrimination. *See, e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The government wants to subject Balsys to the very "trilemma" that the Self-Incrimination Clause prohibits. It seeks a court order directing him to answer the government's questions about his wartime activities, on pain of imprisonment for contempt if he remains silent. It reserves the right to prosecute Balsys for perjury if he "forsak[es his] oath" and testifies falsely. And it concedes that truthful responses to the government's questions could subject Balsys to prosecution, conviction, and a possible death sentence in Israel and Lithuania.

3. Contrary to the government's argument, this Court's decisions--culminating in *Murphy v. Waterfront*

Commission--strongly suggest that the Fifth Amendment privilege prohibits the government from compelling a witness to incriminate himself under foreign law. Although the Court's pre-*Murphy* decisions conflict on application of the privilege when the "using" jurisdiction is not subject to the Fifth Amendment, *Murphy* resolved that conflict against the position that the government advocates here. *Murphy* overruled or rejected the reasoning of the decisions on which the government now relies.

4. The Court should decline the government's invitation to restrict the Fifth Amendment privilege because of an alleged impact on domestic law enforcement. This Court has noted that "claims of overriding [governmental] interests are not unusual in Fifth Amendment litigation and they have not fared well." *Lefkowitz v. Turley*, 414 U.S. 70, 78 (1973). That claim should fare especially poorly here; barring the government from forcing a witness to incriminate himself under foreign law will have little effect on domestic law enforcement.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE SELF-INCRIMINATION CLAUSE SUPPORTS ITS APPLICATION WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

The Fifth Amendment self-incrimination clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. As this Court has noted, "Where there has been genuine compulsion of testimony, the right has been given broad scope." *Michigan v. Tucker*, 417 U.S. 433, 440 (1974). "Genuine compulsion" plainly exists when--as here--testimony is given under court

order backed by the threat of contempt. *See New Jersey v. Portash*, 440 U.S. 450, 459 (1979). Accorded the "broad scope" that *Tucker* contemplates, the constitutional language at issue--"any criminal case"--encompasses both domestic and foreign criminal cases.

The proceedings that Balsys fears in Lithuania and Israel constitute "criminal case[s]" as those words are normally understood. If deported or extradited to one of those countries, Balsys likely would be charged under its penal laws, brought before its courts, and subjected to a trial designed to determine his culpability for alleged past conduct. If found guilty, he would face punishment, including imprisonment and potentially death. Although the line between a "criminal case" and other proceedings might be difficult to draw in some instances under foreign law, just as under domestic law, this case presents no such problem.

The word "any," which precedes the phrase "criminal case," underscores the breadth of the Framers' language. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 117 S. Ct. 1032, 1033 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). By placing the word "any" before the phrase "criminal case," the Framers made clear that the phrase should be given the broadest possible interpretation. Nothing in the constitutional text supports the government's proposed limitation of the Fifth Amendment to compelled testimony that would incriminate the witness in any *domestic* criminal case. *See, e.g., Moses v. Allard*, 779 F. Supp. 857, 874 (E.D. Mich. 1991) ("The language stresses 'any' criminal case; it is not limited to certain criminal proceedings, nor is it limited to domestic criminal cases. It says 'any' criminal case, not 'any domestic criminal case.'").

The government does not analyze the meaning of the words that make up the phrase "any criminal case." It argues instead that "the phrases 'criminal case' in the Fifth Amendment and 'criminal prosecution' in the Sixth Amendment are synonymous." Brief for the United States ("G. Br.") 15. According to the government, because the Court has interpreted the phrase "criminal prosecutions" in the Sixth Amendment to apply only to domestic prosecutions, it should similarly restrict the meaning of the phrase "criminal case" in the Fifth Amendment.

The government's argument fails for several reasons. First, this Court squarely rejected it more than one hundred years ago. The Court found that the phrase "criminal prosecutions" in the Sixth Amendment "distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury," and it declared that "[a] criminal prosecution under article 6 of the amendments, is much narrower than a 'criminal case,' under article 5 of the amendments." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892). Although the Court has limited broad language in *Counselman* suggesting that transactional immunity is necessary to displace the Fifth Amendment privilege, *see Kastigar v. United States*, 406 U.S. 441, 450-55 (1972), it has never questioned the distinction that case draws between the Fifth and Sixth Amendments.

Second, the language and structure of the Fifth and Sixth Amendments undermine the government's argument. The Framers deliberately chose the broader term--"case"--for the Self-Incrimination Clause, and the narrower term--"prosecutions"--for the Sixth Amendment. The Sixth Amendment deals exclusively with the trial rights of an accused person--that is, a person facing "prosecution." It guarantees the accused a speedy trial, trial by jury, notice of the charges, an

opportunity to confront the witnesses against him at trial, compulsory process to obtain evidence at trial, and the assistance of counsel at critical stages connected with the trial. Almost by definition, the Sixth Amendment protects these trial rights exclusively in domestic prosecutions.

By contrast, the Fifth Amendment guarantees a series of rights--including the right to grand jury indictment, the protection against double jeopardy, the privilege against self-incrimination, the right to due process, and the right not to have property taken without just compensation-- that are not limited to criminal trials or, in some instances, even to criminal cases. These rights limit the power of domestic governments, but their operation is not confined to a discrete setting, such as a criminal courtroom. In particular, the Fifth Amendment privilege against self-incrimination bars domestic governments from compelling a witness to provide incriminating testimony against himself, but neither its language nor the constitutional structure purports to limit the feared incrimination to *domestic* incrimination.

Apart from its misplaced effort to equate the Sixth Amendment phrase "criminal prosecutions" with the Fifth Amendment phrase "criminal case," the government offers no basis to interpret the Self-Incrimination Clause contrary to its plain meaning. It acknowledges that "[t]here is no surviving record that, in drafting the Fifth Amendment, the Framers expressly discussed whether the phrase 'any criminal case' in the Self-Incrimination Clause was intended to apply only to domestic, and not foreign, prosecutions." G. Br. 16. The government concludes from this dearth of legislative history that "[t]here is nothing to indicate that the Framers had foreign criminal prosecutions in mind." G. Br. 16. Perhaps not. But the language the Framers chose--"any criminal case"--plainly encompasses foreign as well as domestic criminal cases, and nothing in the history surrounding the adoption and ratification

of the Self-Incrimination Clause provides any reason to limit its plain meaning.

If anything, the historical context of the Fifth Amendment supports its application to bar the government from compelling a witness to incriminate himself under foreign law. As one court observed, when the Amendment was adopted, "[t]his new nation had just fought a war to be free from domination of the American people by a foreign sovereign. It is difficult to credit that, given this context, the founders of this new government would have countenanced the compulsion of an American's testimony so that it could be turned over to an English king's prosecutor for prosecution of that American in England." *Moses*, 779 F. Supp. at 874 n.25.

The government asserts that the Framers were not "operating against any settled understanding of the privilege against self-incrimination as it had developed in the common law of England and the American colonies." G. Br. 16. But two pre-Constitutional English decisions support application of the privilege to bar compelled self-incrimination under foreign law. In *East India Co. v. Campbell*, 1 Ves. sen. 246, 27 Eng. Rep. 1010 (1749), the English court upheld a claim of privilege based on the defendant's fear of prosecution in India. *See id.* at 247, 27 Eng. Rep. at 1011, *quoted in Murphy*, 378 U.S. at 58. And in *Brownsword v. Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (1750), the Court of Chancery upheld a claim of privilege on the ground that a response, although not incriminating under common law, would render the defendant "liable to prosecution in ecclesiastical court." *Id.* at 244-45, 28 Eng. Rep. at 157-58, *quoted in Murphy*, 378 U.S. at 58-59.

The government argues that *Campbell* and *Brownsword* "involved two judicial systems operating under the same sovereign." G. Br. 17. But "[a] review of the English court

opinions . . . strongly suggests that these courts viewed the ecclesiastical courts and the courts of India as distinct and independent entities." *United States v. Gecas*, 120 F.3d 1419, 1469 (11th Cir. 1997) (Birch, J., dissenting); *see Moses*, 779 F. Supp. at 876; *cf.* J.A.C. Grant, *Federalism and Self-Incrimination*, 5 UCLA L. Rev. 1, 7-8 & n.178 (1958) (noting that "English courts have considered colonial tribunals to be *foreign*, and Indian native state courts were considered *foreign* even to those of British India") (emphasis in original; footnotes omitted). In any event, nothing in the pre-Constitutional interpretation of the privilege against self-incrimination supports the government's effort to restrict the plain language of the Fifth Amendment. That language--"any criminal case"--encompasses both domestic and foreign criminal cases.

II. THE POLICIES UNDERLYING THE SELF-INCRIMINATION CLAUSE SUPPORT ITS APPLICATION WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

The plain language of the Self-Incrimination Clause makes clear that the privilege bars the government from forcing a witness to incriminate himself under foreign law. The same result follows from the analysis that this Court adopted in *Murphy*. In that case, involving application of the privilege between the state and federal governments, the Court considered "whether such an application of the privilege promotes or defeats its policies and purposes." 378 U.S. at 54. Here, as in *Murphy*, application of the privilege to prevent the government from forcing a witness to provide testimony that could lead to his conviction and punishment abroad promotes the "policies and purposes" of the Fifth Amendment.

This Court has identified several policies that underlie the privilege against self-incrimination:

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load . . . ; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. at 55; *see, e.g., Pennsylvania v. Muniz*, 496 U.S. 582, 595 n.8 (1990); *Doe v. United States*, 487 U.S. 201, 212-13 (1988).

These policies fall into two general categories: the privilege "secur[es] individual liberties," and it "constrain[s] the government from overzealous prosecution of individuals." *Gecas*, 120 F.3d at 1460 (Birch, J., dissenting); *cf. United States v. Balsys*, 119 F.3d 122, 129 (2d Cir. 1997) (the privilege "advances individual integrity and privacy, it protects against the state's pursuit of its goals by excessive means, and it promotes

the systemic values of our method of criminal justice"). These policies are closely related; protecting individual liberty necessarily restrains the government, and restraining the government in its dealings with its citizens often advances individual liberty. *See* Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context* 113-17 (forthcoming in 45 UCLA L. Rev.).[2/]

The first of these policies--securing individual liberty--forms the heart of the Fifth Amendment's protections. "By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch v. United States*, 409 U.S. 322, 327 (1973). This emphasis on the individual manifests itself in the courts' refusal to let the government force a witness to choose between disobeying a court order to testify, giving false testimony, or incriminating himself. "At its core, the [Fifth Amendment] privilege reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury." *Muniz*, 496 U.S. at 596 (quotation omitted).

Applying the Fifth Amendment privilege to bar the United States government from compelling a witness to incriminate himself under foreign law advances this "core"

[2/] We understand that the parties and each Member of the Court have been furnished with copies of Professor Amann's manuscript.

policy. This case illustrates the point. If the government prevails, Balsys will confront the "cruel trilemma" that the privilege proscribes. The district court has ordered him to answer the government's questions about his wartime activities, on pain of imprisonment for contempt if he remains silent. *See United States v. Balsys*, 918 F. Supp. 588, 600 (E.D.N.Y. 1996). The government reserves the right to prosecute Balsys for perjury if he "forsak[es his] oath" and testifies falsely. And it is undisputed in this Court that truthful responses to the government's questions could subject Balsys to prosecution, conviction, and a possible death sentence in Israel and Lithuania. *See id.* at 592-97 (finding that Balsys has a "real and substantial fear" of prosecution).

Since the landmark decision in *Murphy*, this Court has never interpreted the Fifth Amendment to permit the United States to confront a witness with the "cruel trilemma" that the government seeks to impose on Balsys. Indeed, the Court has repeatedly invoked the "cruel trilemma" standard to test claims of the Fifth Amendment privilege. *See, e.g., Muniz*, 496 U.S. at 596-97; *Doe*, 487 U.S. at 212-14; *South Dakota v. Neville*, 459 U.S. 553, 561-64 (1983); *Tucker*, 417 U.S. at 444-45. The Court should not retreat from that standard here.

The government largely ignores the Fifth Amendment concern with individual dignity and privacy. It never mentions the "cruel trilemma" standard. It merely notes that "'the privilege has never been given the full scope which the values it helps to protect suggest.'" G. Br. 29 (quoting *Schmerber v. California*, 384 U.S. 757, 762 (1966)). But the Court has made that observation when witnesses have attempted to stretch the Self-Incrimination Clause beyond its plain language to include compelled *non-testimonial* incrimination. *See Doe*, 487 U.S. at 213 & n.11 (rejecting application of Fifth Amendment to bank consent form); *Schmerber*, 384 U.S. at 762 (rejecting

application of Fifth Amendment to compelled blood sample). Here, however, the plain language of the Fifth Amendment squarely supports application of the privilege to compelled testimony that incriminates the witness under foreign law. *See supra* Part I. The policies that underlie the privilege simply confirm that the language means what it says.

The government focuses almost exclusively on the policy of preventing official overreaching, and it insists that the privilege should not be recognized here because no such risk exists when the compelled testimony will be used in a foreign prosecution. G. Br. 26-30. This Court rejected the identical argument in *Murphy*. Responding to the state's contention that applying the privilege between the state and federal governments would not serve the policy of preventing government overreaching, the Court declared that "[i]t will not do . . . to assign one isolated policy to the privilege, and then to argue that since 'the' policy may not be furthered measurably by applying the privilege across state-federal lines, it follows that the privilege should not be so applied." *Murphy*, 378 U.S. at 56 n.5. Similarly here, "[i]t will not do" for the government to argue that the privilege serves only to prevent overreaching and then to contend that that policy "may not be furthered measurably" by applying the privilege to bar compelled self-incrimination under foreign law.[2]

The government's argument fails even on its own terms. It asserts that "'[w]here the crime is a foreign crime, any motive

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[2] *See* Recent Case: Criminal Law and Procedure, *Criminal Procedure--Fifth Amendment--Eleventh Circuit Holds That the Privilege Against Self-Incrimination Does Not Apply to the Possibility of Foreign Prosecution.*--United States v. Gecas, 111 Harv. L. Rev. 1128, 1132-33 (1998) [hereinafter "Recent Case"].

to inflict brutality upon a person because of the incriminating nature of the disclosure--any "conviction hunger" as such--is absent.'" G. Br. 28 (quoting 8 John H. Wigmore, *Evidence* § 2258, at 345 (McNaughton rev. ed. 1961)). But this argument ignores the reality of modern law enforcement. Crime is increasingly international in scope. Extradition treaties, mutual legal assistance treaties, and other, less formal modes of intergovernmental law enforcement cooperation proliferate. *See, e.g.*, *Balsys*, 119 F.3d at 130-31; Amann, *supra*, at 84-93. As the courts below found, the Office of Special Investigations within the Department of Justice--the federal entity pursuing the case against Balsys--was created "for the sole purpose of investigating and gathering evidence of alleged Nazi collaborators residing in the United States illegally, and taking legal action to denaturalize, deport or prosecute them"; it "has entered into an agreement to provide evidence that it has gathered on suspected Nazi collaborators to Lithuania"; and it has "exchanged incriminating evidence on suspected Nazi collaborators with Israel on past occasions." *Balsys*, 119 F.3d at 131; *see Gecas*, 120 F.3d at 1426; *Balsys*, 918 F. Supp. at 595-96. The OSI and other federal agencies engaged in the "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), have a powerful interest in the outcome of foreign prosecutions in which they play a key investigative role. Not only do those agencies want to see their own work bear fruit; they also hope to obtain reciprocal assistance from foreign authorities. The "cooperative federalism" of the 1960s, *Murphy*, 378 U.S. at 55-56, has become the "cooperative internationalism" of the 1990s, *Balsys*, 119 F.3d at 130-31.

The court of appeals recognized that "danger [of abuse] exists where the fear is of prosecution in foreign lands," because of the federal government's "significant stake in many foreign criminal cases." *Balsys*, 119 F.3d at 130-31. Addressing this

point, the government insists that "[t]he court's rationale proves too much," because "[i]t would apply even more strongly when the United States seeks self-incriminating testimony from a witness, under a grant of immunity, so that the United States itself may prosecute the witness's more culpable conspirators." G. Br. 28. This argument contains a basic flaw. Testimony given "under a grant of immunity" by definition cannot be "self-incriminating" under domestic law. *See Kastigar*, 406 U.S. at 453. Thus, whatever incentive the government might have to abuse an immunized witness to obtain incriminating testimony against the witness' co-conspirators, that abuse does not implicate the privilege against self-incrimination (unless, of course, the witness has a real and substantial fear of foreign prosecution). On the other hand, government overreaching designed to force a person to incriminate himself under foreign law *does* implicate the privilege, because it compels him to become a witness against himself in a criminal case and confronts him with the "cruel trilemma" that the privilege prohibits.

III. THIS COURT'S PREVIOUS DECISIONS SUPPORT APPLICATION OF THE PRIVILEGE WHEN THE WITNESS HAS A REAL AND SUBSTANTIAL FEAR OF FOREIGN PROSECUTION.

This Court's previous decisions, culminating in *Murphy*, support application of the privilege against self-incrimination when the witness has a real and substantial fear of foreign prosecution.

Before *Murphy*, two lines of cases from this Court addressed application of the privilege against self-incrimination when the witness feared prosecution in a jurisdiction that was not bound by the Fifth Amendment. The cases concerned

efforts by the federal government to compel witnesses to incriminate themselves under state law before this Court had applied the Fifth Amendment to the states. In one line of cases, the Court held that the privilege prohibited a federal court from compelling a witness to disclose information that could incriminate him under state law. *See Ballmann v. Fagin*, 200 U.S. 186, 195-96 (1906); *United States v. Saline Bank*, 26 U.S. (1 Pet.) 100, 104 (1828). In the other line of cases, the Court limited the privilege to testimony that could incriminate the witness in the same jurisdiction that was compelling the testimony. *See United States v. Murdock*, 284 U.S. 141, 149 (1931); *Hale v. Henkel*, 201 U.S. 43, 68-69 (1906) (dictum); *cf. Feldman v. United States*, 322 U.S. 487, 490-94 (1944) (Fifth Amendment does not bar admission in federal court of testimony given in state court). Until *Murphy*, these two lines of cases stood in tension with each other. *See, e.g., United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103, 113 (1927); Amann, *supra*, at 8-18.

The Court resolved this tension in *Murphy*. It dismissed the dictum in *Hale* as "not well founded," squarely rejected the reasoning of *Murdock*, and embraced the holdings of *Saline Bank* and *Ballmann*. *See* 378 U.S. at 59-78. After examining English decisions, the Court found that the privilege against self-incrimination in that country "protect[ed] witnesses against disclosing offenses in violation of the laws of another country." *Id.* at 72 (citing *United States v. McRae*, 3 Ch. App. 79 (1867)).[4/] The *Murphy* Court concluded:

[4/] The government suggests that this Court erred in *Murphy* when it found that *McRae* stated the "settled" English rule. It contends that the English rule actually was less settled than the Court believed it to be. G. Br. 23-26. There is ample support for the conclusion reached in *Murphy*. *See, e.g.*, J.A.C. Grant, *Federalism and Self-Incrimination*, 5 UCLA L. Rev. 1, 6 (1958)

> In light of the history, policies and purposes of the privilege against self-incrimination, we now accept as correct the construction given the privilege by the English courts . . . and by Chief Justice Marshall and Justice Holmes. See *United States v. Saline Bank of Virginia, supra*; *Ballmann v. Fagin, supra*. We reject--as unsupported by history or policy--the deviation from that construction only recently adopted by this Court in *United States v. Murdock, supra*, and *Feldman v. United States, supra*. We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.

Id. at 77-78.

Murphy does not resolve the precise question presented here; the holding in that case addressed application of the privilege against self-incrimination when both the compelling and using jurisdictions are subject to the Fifth Amendment. But *Murphy*'s reasoning--particularly its embrace of *Saline Bank*, *Ballmann*, and the English rule as stated in *McRae*--strongly supports application of the privilege to bar the United States government from compelling a witness to incriminate himself under foreign law. *McRae* expressly held that the privilege applies when the witness fears foreign prosecution, *see* 3 Ch.

(concluding that "the *McRae* case seems to have settled the matter"). The important point is that *Murphy* "accept[ed] as correct" the principle stated in *McRae*, as well as in *Saline Bank* and *Ballmann*. 378 U.S. at 77-78; *see Gecas*, 120 F.3d at 1469-70 (Birch, J., dissenting); *Balsys*, 119 F.3d at 133 n.8.

App. at 87, and *Saline Bank* and *Ballmann* applied the privilege under closely analogous circumstances--that is, where the Fifth Amendment bound the compelling jurisdiction but not the potential using jurisdiction.[5/] As Chief Justice Burger observed, *Murphy* "contains dictum which, carried to its logical conclusion, would support" application of the privilege when the witness fears foreign prosecution. *Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers).

To distinguish *Murphy*, the government relies heavily on a footnote in *Kastigar* asserting that the ruling in *Murphy* "'was made necessary by the decision in *Malloy v. Hogan,* [378 U.S. 1 (1964)], in which the Court held the Fifth Amendment privilege applicable to the States through the Fourteenth Amendment.'" G. Br. 21 (quoting *Kastigar*, 406 U.S. at 456 n.42). The government infers from this statement that, under *Murphy*, a witness may assert the privilege only when both the compelling jurisdiction and the potential using jurisdiction are subject to the Fifth Amendment. Here, of course, that is not the case; the Fifth Amendment binds the compelling jurisdiction--the United States--but it does not bind Lithuania and Israel.

The government's inference from the *Kastigar* footnote is unwarranted. *Murphy* involved an effort by a *state* to compel testimony over the witness' assertion of the Fifth Amendment privilege. For the privilege to prevent such compulsion, the compelling jurisdiction must be subject to the Fifth Amendment. *See, e.g., Jack v. Kansas*, 199 U.S. 372, 379-80 (1905). Before *Malloy*, the Fifth Amendment did not bind the states. *See Twining v. New Jersey*, 211 U.S. 78 (1908). *Malloy* overruled

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[5/] In both *Saline Bank* and *Ballmann*, the potential using jurisdiction was a state. At the time those cases were decided, this Court had not yet applied the Fifth Amendment to the states.

Twining and held for the first time that the Fifth Amendment applies to the states through the Fourteenth Amendment. Only after *Malloy* were the compelling jurisdictions in *Murphy*--the States of New York and New Jersey--subject to the Fifth Amendment. In that sense only, the decision in *Malloy* necessitated the decision in *Murphy*.

This relation between *Malloy* and *Murphy* does not mean--as the government would have it--that a witness cannot assert the privilege against self-incrimination unless both the compelling jurisdiction and the potential using jurisdiction are subject to the Fifth Amendment. By its discussion of English law and its approval of *Saline Bank* and *Ballmann*, *Murphy* made clear that a witness may assert the privilege against a compelling jurisdiction that is subject to the Fifth Amendment even if the potential using jurisdiction is not subject to the constitutional limitation.

To buttress its reading of *Murphy*, the government cites *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). G. Br. 22. *Verdugo-Urquidez* is a Fourth Amendment case. In brief dictum, unaccompanied by analysis, this Court asserted that the privilege against self-incrimination "is a fundamental trial right of criminal defendants" and added that "[a]lthough conduct by law enforcement officers prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Id.* at 264. Drawing on this language, the government claims that "[e]ven if the compelled testimony is later used against the witness in a foreign prosecution, a constitutional violation cannot occur when the 'using' sovereign is an independent foreign government." G. Br. 28.

The *Verdugo-Urquidez* dictum on which the government relies is not well founded. This Court has repeatedly held that the Fifth Amendment prohibits the *compulsion*--and not merely

the *use*--of potentially incriminating testimony. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 (1983); *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-06 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 77-78 (1973); *Counselman*, 142 U.S. at 562; *United States v. Burr*, 25 F. Cas. 38 (C.C.D.Va. 1807) (Marshall, Circuit Justice) (No. 14692e).[6/] Indeed, the Court has recognized that "the touchstone of the Fifth Amendment is compulsion." *Cunningham*, 431 U.S. at 806. For the Court to elevate the *Verdugo-Urquidez* dictum to a holding, it would have to overrule more than a century of previous decisions and dramatically reinterpret the Self-Incrimination Clause.[7/]

Kastigar--which *Verdugo-Urquidez* cites in the course of its dictum--does not support the proposition that the Self-Incrimination Clause prohibits only use, and not compulsion, of

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[6/] Of course, if the government compels incriminating testimony in violation of the privilege, the Fifth Amendment also prohibits jurisdictions bound by the privilege from using the incriminating testimony against the witness in a criminal case. *See, e.g., Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

[7/] Such a reinterpretation of the Fifth Amendment would have potentially far-reaching consequences. For example, courts have generally held that a criminal defendant cannot obtain the testimony of a witness who asserts his privilege against self-incrimination. *See, e.g., United States v. Carr*, 67 F.3d 171, 176 (8th Cir. 1995), *cert. denied*, 516 U.S. 1182 (1996); *Gleason v. Welborn*, 42 F.3d 1107, 1109 (7th Cir. 1994); *United States v. Thornton*, 733 F.2d 121, 125 (D.C. Cir. 1984). But the defendant seeks only to compel the testimony, not to use it against the witness in a criminal case. Under the *Verdugo-Urquidez* dictum, therefore, the defendant's Sixth Amendment right to compulsory process should overcome the witness' refusal to testify.

self-incriminating testimony. *Kastigar* declares that the "sole concern" of the privilege "is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." 406 U.S. at 453 (quotations omitted; ellipsis in original). As Judge Birch recently explained:

> The focus of Kastigar, as is that of the Fifth Amendment, is on the act of compelling testimony: A domestic court is absolutely prohibited from engaging in such an act if the testimony could lead to a criminal conviction; that is, Kastigar recasts in the context of the immunity statute the requirement that the fear of prosecution must be reasonable to justify the invocation of the privilege against self-incrimination. The granting of use and derivative use immunity removes the danger of conviction on the basis of the compelled testimony and, thus, removes the necessary precondition (i.e., fear of use or derivative use of compelled testimony in a criminal prosecution) to a proper invocation of the privilege; at least it does so in the usual case involving a potential domestic prosecution.

Gecas, 120 F.3d at 1462 (Birch, J., dissenting). Thus, *Kastigar* is entirely consistent with this Court's cases holding that the Fifth Amendment prohibits the government from compelling a witness to give potentially self-incriminating testimony.

This Court's decisions in *Saline Bank*, *Ballmann*, and *Murphy* strongly support what the language and the policies of the Self-Incrimination Clause mandate: that the United States government cannot compel a witness to incriminate himself in

"any criminal case," domestic or foreign. Nothing in *Kastigar* is to the contrary.

IV. THE COURT SHOULD NOT RESTRICT THE FIFTH AMENDMENT PRIVILEGE BECAUSE OF ITS ASSERTED IMPACT ON DOMESTIC LAW ENFORCEMENT.

Without citing a single instance in which an assertion of the privilege against self-incrimination based on fear of foreign prosecution has actually impeded law enforcement, the government asks the Court to restrict the privilege on that basis. G. Br. 30-36. The Court should decline the government's invitation, as it has done repeatedly in the past. The alleged impact on law enforcement from applying the privilege to foreign incrimination is both minimal and constitutionally irrelevant.

Almost seventy-five years ago, the Court rejected the government's argument that permitting a debtor to assert the Fifth Amendment privilege during a bankruptcy examination would undermine the bankruptcy system. *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The Court similarly rejected the argument that extending the privilege to those undergoing custodial interrogation--and requiring certain warnings to protect the right to remain silent--would cripple law enforcement. *Miranda v. Arizona*, 384 U.S. 436 (1966). In 1973, faced with another contention that application of the privilege would damage a key government function, the Court observed that "claims of overriding [governmental] interests are not unusual in Fifth Amendment litigation and they have not fared well." *Turley*, 414 U.S. at 78. The Court underscored the point in *Cunningham*: "We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need." 431 U.S. at 808 (citing *Turley*).

Cunningham and the cases preceding it make clear that, unlike some constitutional rights, the Fifth Amendment privilege cannot be balanced against competing government interests. *See Portash*, 440 U.S. at 459. The Framers struck the appropriate balance when they crafted the constitutional text. The privilege applies, according to its language and purposes, regardless of its impact on law enforcement or other government interests. *See, e.g., Moses v. Allard*, 779 F. Supp. 857, 882 (E.D. Mich. 1991); *In re Cardassi*, 351 F. Supp. 1080, 1086 (D. Conn. 1972).

For several additional reasons, the government's "impact on law enforcement" argument carries little weight. First, claims of the Fifth Amendment privilege based on self-incrimination under foreign law are rarely upheld. To sustain the privilege, the witness must demonstrate a "real" and "substantial" fear of foreign prosecution. *See Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478-81 (1972). Witnesses have satisfied this burden in only a handful of reported cases stretching back more than twenty-five years; far more often than not, courts have found that the witness has failed to meet his burden. *See, e.g., id.*; *Gecas*, 120 F.3d at 1426 (citing cases); *Balsys*, 119 F.3d at 127, 135 (citing cases).[8/]

[8/] *See also* Recent Case, *supra* note 3, at 1132 ("[T]he threshold requirement of a 'real and substantial' fear of foreign conviction provides a meaningful limitation on the Fifth Amendment privilege, thereby preventing serious impairment of domestic law enforcement."). The government asserts that the "real and substantial fear" standard is not "workable" because of an alleged difficulty in ascertaining foreign law. G. Br. 36. But the government cites no case in which a court has actually encountered any such difficulty, and it does not contend that the lower courts in this case did so. In any event, because the witness bears the burden of establishing a real and substantial

Because such claims are rarely upheld, their impact on law enforcement has been and will remain minimal.

Second, witnesses with a real and substantial fear of foreign prosecution who are compelled to endure the "cruel trilemma" of perjury, contempt, and self-incrimination are unlikely to choose self-incrimination--the only choice that will aid law enforcement. This case provides an excellent example. Assume, hypothetically, that truthful testimony by Balsys about his wartime activities would incriminate him under Lithuanian or Israeli law. Faced with a choice between relatively brief incarceration in a United States prison for contempt if he remains silent, possible prosecution and incarceration (again in a United States prison) for perjury if he testifies falsely, and deportation, prosecution for war crimes, and possible execution if he testifies truthfully, it seems extremely doubtful that he--or anyone else in his position--would choose the last alternative.

Third, *civil* law enforcement will suffer little, if at all, from permitting witnesses to assert the Fifth Amendment privilege based on fear of foreign prosecution. That is so because, in civil cases, an adverse inference may be drawn from the witness' invocation of the privilege. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

The government does not offer a single example--not even a hypothetical one--to illustrate the effect on law enforcement that it claims will follow from an adverse ruling in this case. In *Gecas*, however, the plurality attempted to devise such an example:

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fear of foreign prosecution, any significant uncertainty in foreign law will redound to his detriment and to the government's benefit.

> Assume . . . that the sale and distribution of cocaine is illegal in the nation of Ames. A citizen of Ames visits the United States on a temporary visa. She is arrested in Miami International Airport after police find five kilograms of cocaine in her luggage. The prosecution offers her immunity in exchange for testimony about three leaders of a drug ring operating in Southern Florida. Under the rule proposed by Gecas, she can still refuse to testify because Ames may prosecute her for the same conduct.

120 F.3d at 1434.

This hypothetical underscores the weakness of the "impact on law enforcement" argument. To find any possibility of such an impact from these facts, one must assume that the Ames citizen (1) could establish a real and substantial fear of prosecution if deported to Ames, and (2) would provide truthful testimony against the Florida drug dealers (rather than go into contempt or perjure herself) if denied the privilege based on fear of foreign prosecution. Neither assumption can readily be made.

Of equal significance, the Eleventh Circuit's hypothetical ignores what actually would happen in such a case. Even if the Ames citizen established a real and substantial fear of prosecution and a court upheld her claim of privilege, the government could still obtain her cooperation. The federal prosecutor handling the matter would prepare to indict her for possession of the five kilograms of cocaine with intent to distribute. Her counsel would explain her choices: she could permit herself to be indicted and face almost certain conviction and a lengthy prison sentence, or she could cooperate with the government against the Florida drug dealers, avoid prison time

in the United States, and take her chances with prosecution in Ames. Given this choice, most defendants would agree to cooperate. If possible prosecution in Ames remained too great a disincentive, the defense attorney could attempt to negotiate an agreement with the government under which the defendant would be permitted to remain in the United States when her cooperation was complete. Whether the government would enter into such an agreement would depend on how valuable it considered her testimony. Through this process of negotiation, backed by the threat of domestic prosecution, the government likely would obtain the assistance it needed.

The government's claim that recognition of the privilege against self-incrimination in this case would damage domestic law enforcement is both exaggerated and, under *Cunningham* and *Turley*, irrelevant. The Court should interpret the Self-Incrimination Clause, in light of its language and policies, to prohibit the federal government from compelling a witness to incriminate himself under foreign law. The Court should not force Aloyzas Balsys to face the "cruel trilemma" that the Fifth Amendment proscribes.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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